89- 1493

No. 89–

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

AIR LINE PILOTS ASSOCIATION INTERNATIONAL,

Petitioner,

–against–

JOSEPH E. O'NEILL, et al.,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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March 23, 1990

QUESTIONS PRESENTED

Whether in a breach of the duty of fair representation case challenging a union's conduct in negotiating an end to a strike (as opposed to administering a collective bargaining agreement), the Fifth Circuit was correct in applying the standard set forth in *Vaca v. Sipes*, 386 U.S. 171 (1967), in conflict with the Seventh, Ninth, and Eleventh Circuits which apply a standard derived from *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953)?

Whether in a breach of the duty of fair representation case challenging a union's decision to negotiate a strike settlement agreement rather than to make an unconditional offer to return to work, summary judgment for the union may be reversed in the absence of any evidence of bad faith or intentional misconduct by the union and when legal uncertainty existed as to the employees' rights under an unconditional offer to return?

Whether the Fifth Circuit's failure to consider the Supreme Court's decision in *Trans World Airlines, Inc. v. Independent Federation of Flight Attendants*, 109 S. Ct. 1225 (1989), and its reliance on the Eighth Circuit's decision in that case which this Court had reversed, requires summary vacatur and remand?

NAMED PLAINTIFFS

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JOSEPH E. O'NEILL, *et al.*,

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Petition for Writ of Certiorari To The
United States Court of Appeals For The Fifth Circuit

Petitioner respectfully requests that writ of *certiorari* be issued to review the decision and judgment of the United States Court of Appeals for the Fifth Circuit, in *O'Neill, et al. v. Air Line Pilots Ass'n Intl.*, 5th Cir. No. 88–2848 (Oct. 31, 1989).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 886 F.2d 1438 (5th Cir. 1989). (Appendix 2.) Upon petitions for rehearing and rehearing en banc, the Court of Appeals issued an unreported order. (Appendix 2.) The District Court opinion was issued from the bench. (Appendix 3.)

JURISDICTION

The judgment of the Court of Appeals was entered on October 31, 1989. Timely petitions for rehearing and rehearing en banc were denied on December 27, 1989. This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Respondents' complaint alleges a breach of petitioner's duty of fair representation in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, and applicable case law. (Relevant excerpts attached as Appendix 1.)

STATEMENT OF THE CASE

At the core of this case is the allegation of the plaintiff–respondent class (the "O'Neill Group") that petitioner Air Line Pilots Association International ("ALPA") ended the bitter and difficult two year strike at Continental Airlines ("Continental") on terms that constituted a breach of ALPA's duty of fair representation ("DFR") in violation of the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA").

In 1983, ALPA was a party to a collective bargaining agreement with Continental. On September 24, 1983, Continental filed for Chapter 11 reorganization in the Bankruptcy Court of the Southern District of Texas, unilaterally abrogated its ALPA contract, and cut pilots' salaries and benefits to less than half the amounts provided by the contract. (R.131, Higgins Aff. ¶4.)[1] ALPA responded by striking

1. Throughout this brief, the following abbreviations will be used: "R." refers to the record in the District Court. "App." refers to the Appendix annexed to this Petition. "App. 1" contains relevant excerpts of the Railway Labor Act. "App. 2" contains the Fifth Circuit's October 31, 1989 opinion and the December 27, 1989 order denying rehearing; "App. 3" contains the District Court's transcribed decision granting summary judgment on November 30, 1987; and "App. 4" contains the October 31, 1985 order and award of the

Continental on October 1, 1983. The strike lasted more than two years, during which the bankruptcy court, over ALPA's objection, approved Continental's rejection of its labor contracts. (App.2 at 2.)

ALPA was unable to significantly affect Continental's business. (R.131, Higgins Aff. ¶ 21.) The company had little trouble hiring pilot replacements; by August 1985, 1,600 permanent replacement pilots were working (including new hires, non–strikers, and strikers who abandoned the strike). (*Id.* at ¶ 6; App.2 at 2.) At that time, only 1,000 pilots still remained on strike. (*Id.*) In sum, the strike did not succeed in putting effective economic pressure on Continental to reach a negotiated agreement with ALPA.

Three critical actions undertaken by Continental in 1985 weakened ALPA's negotiating strength. First, on August 26, 1985, because the permanent replacements outnumbered striking pilots, Continental stated that it was withdrawing recognition of ALPA and was breaking off all negotiations with ALPA over proposed terms of a collective bargaining agreement. (R.131 Higgins Aff. ¶ 6.)

Second, in September 1985, Continental announced its intention to fill all of its pilot vacancies by posting "Supplementary Base Vacancy Bid 1985–5" (the "85–5 bid") for 441 captain and first officer vacancies and an undetermined number of second officer vacancies. (*Id.* ¶ 7.)[2] The number of

Bankruptcy Court.

2. A "vacancy bid" in the airline industry is a long–term pilot training and staffing plan, which projects and fills pilot staffing needs by base (*i.e.* geographic location), equipment (*i.e.* aircraft type), and position (*i.e.* captain, first officer, second officer). The projections are based on scheduled aircraft deliveries (or sales, leases, etc.), expected retirements or attrition, and marketing plans for future flight schedules. Once a system–wide vacancy bid is announced, each Continental pilot is allowed to "bid" his or her preference for base, equipment, and status, and the bids are awarded in seniority order. The bid award assigns each pilot to a specific base, equipment, and position. A training schedule is devised to ensure that each pilot who requires training will

vacancies posted for captain positions (218) was the largest in Continental history and, if implemented, would have effectively eliminated the possibility that more than a handful of captain vacancies would become available over the next several years. (*Id.* ¶¶ 7–8.) Accordingly, several hundred striking pilots attempted to protect their post–strike job prospects by submitting bids. (App.2 at 3–4; deposition of D. Kirby Schnell at 436, 499.)

Finally, on September 25, 1985, one week after the 85–5 bid closed, Continental filed a claim in federal court against ALPA seeking to void all offers tendered by strikers in the 85–5 bid as fraudulent and designed to interfere with Continental's business, and stating that strikers were not entitled to any of the 85–5 bid vacancies under any circumstances. (R.163, Att. 9.) After the bid closed, Continental announced that all the posted bid vacancies had been filled with working permanent replacement pilots. (R. 131, Higgins Aff. ¶ 8.)

The Continental Master Executive Council ("MEC") (the organizational sub–division of ALPA elected to function as the governing council for ALPA members employed by Continental) (R.131, Higgins Aff. ¶¶ 2–3), met in late September, 1985 to consider the only two viable options remaining: making an unconditional offer to return to work or pursuing a negotiated end to the strike.

The MEC first rejected a motion to make an unconditional offer to return — largely at the urging and with the votes of MEC members who are named representatives of the plaintiff group. (Deposition of Plaintiff Robert Therrien ("Therrien dep.") at 96–104.) In rejecting an unconditional return, the MEC made a judgment that, since Continental had already filled all of the posted 85–5 bid vacancies with permanent replacements, ALPA's best hope for obtaining access for

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be trained in position on a schedule designed to avoid any shortage of qualified pilots and any disruptions to service. (R.163, Att. 9; Exh. 25 to deposition of Dennis Higgins.)

striking pilots to those positions (and any other pilot positions at Continental in seniority order) was through negotiation. (R.131, Higgins Aff. ¶ 8; Therrien dep. at 103.) The MEC then authorized the MEC officers and negotiating committee chairman to negotiate a conclusion to the strike. (R.131, Higgins Aff. ¶16, Exh. J.) At the MEC's request, the bankruptcy court convened an intensive round of negotiations over a back–to–work agreement. (*Id.* ¶ 8.)

By the end of October, 1985, ALPA and Continental had negotiated, under the bankruptcy court's auspices, significant aspects of a back–to–work arrangement but had failed to reach a complete agreement to end the strike. (*Id.* ¶ 9.) Bankruptcy Judge Roberts reviewed the negotiated terms of the back–to–work agreement, resolved the remaining open terms at the request of the parties, and on October 31, 1985, issued an order and award of the bankruptcy court covering all aspects of the return to work of ALPA pilots. (*Id.*; App.4; deposition of Donald Henderson, Exhs. 53, 54.)

The order and award was described by the bankruptcy court as "a global [settlement which] encompasses a myriad of individual situations and circumstances." (Order of December 27, 1985, R.163, Att. 2.8 at 6.) Continental and ALPA each agreed to withdraw all pending litigation between them. (App.4 at 23.) The back–to–work provisions provided that pilots who agreed to waive certain individual strike litigation claims against Continental had the right to choose recall and reinstatement in seniority order ("Option 1") or voluntary severance with payment of $4,000 per year of service ("Option 2"). (*Id.* at 5, 15–16.) Pilots who chose to preserve all their litigation rights against Continental were offered "Option 3": recall after the Option 1 pilots had been reinstated. (*Id.* at 5, 22.) The order and award did not enhance ALPA's position as a collective bargaining representative; it provided that it did not "constitute express or implied recognition of ALPA by Continental." (*Id.* at 23.)

Significantly, although Continental had already awarded all of the posted 85–5 bid positions to permanent replacements,

the order and award unwound those job assignments and granted nearly half the captain positions to returning strikers. Permanent replacements were to receive the first 100 captain positions allotted in the 85–5 bid, returning strikers the next 70 and, thereafter, returning strikers and replacement pilots were to be awarded captain vacancies on a 1:1 ratio. (*Id.* at 7–8.)[3] The remaining striking pilots were recalled to all available first and second officer positions and upon recall were allowed to bid in these positions purely on seniority basis.

In short, the order and award achieved numerous substantial benefits with a certainty that could not have been achieved through an unconditional return. The order and award:

(a) obtained the guaranteed right for strikers to fill, in seniority order, nearly half of the captain positions which Continental had already filled with non–strikers through the 85–5 bid (*id.* at 6–7);

(b) created a guaranteed schedule by which a substantial number of returning strikers had to be promoted to captain or receive captain's pay until vacancies consistent with that schedule arose (*id.* at 7–8);

(c) obtained the continuing jurisdiction and enforcement power of the bankruptcy court to ensure that Continental would fulfill its obligations (*id.* at 24–25);

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3. Splitting captain positions pursuant to this formula was necessary during the post–strike transition period to facilitate an orderly integration of striking pilots back into the work force. Critically, however, other than the company's right to assign the base and equipment of a pilot's initial captain position and to require up to six months' experience as a first officer before serving as a captain, the order and award placed no other restrictions on the pilots' exercise of seniority rights once the pilot was recalled to work. Another provision of the order and award permitted Continental to assign the base and equipment of a returning striker in his/her initial post–strike position. (App.4 at 6.) This provision merely memorialized a right that Continental would have had even under an unconditional offer to return.

(d) obtained the right of early severance, with a payment of $4,000 for each year of employment ($2,000 for pilots furloughed before the strike), for pilots who were not employed by another air carrier and who did not wish to return to work for Continental after the two year absence occasioned by the strike (*id.* at 15–16); and

(e) guaranteed the right of all Option 1 pilots to be recalled in seniority order as future vacancies arose regardless of whether a pilot had found comparable work with another commercial airline and without any fear or threat of litigation (*id.* at 5).

Nearly six months after entry of the order and award, a group of pilots commenced this class action on behalf of all pilots who joined the strike and were not working for Continental at the end of the strike, claiming breach of the duty of fair representation, violation of statutory rights to vote, and two other claims not relevant here. The defendants were ALPA, the MEC, and five individual union officials.

The district court dismissed the entire complaint on summary judgment because the record evidence showed only that the plaintiffs were not satisfied with the results their union officials obtained in good faith in the face of "what was indisputably a hostile intransigent employer." (App.3 at 4.) That court found that there was nothing in the record to support an allegation that ALPA acted discriminatorily, arbitrarily, or in bad faith. Specifically, the district court found (App.3 at 3, 5):

> There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.
>
> • • •

> I don't think that the behavior of the Union has been shown to have any segment of [depravity] to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.
>
> From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Therefore, the district court dismissed the DFR claim.[4]

The district court also ruled that plaintiffs had no right to vote on the order and award, either under ALPA's governing documents (App.3 at 4) or under Section 101(a)(1) of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 411(a)(1)). (App.3 at 3.)

Plaintiffs appealed to the Fifth Circuit Court of Appeals only as to defendant ALPA, and only in respect of their DFR and LMRDA § 101 causes of action. On October 31, 1989, the Fifth Circuit affirmed the district court's decision dismissing the LMRDA § 101 claim, but vacated as to the DFR claim.

The Fifth Circuit held that the plaintiffs could assert two legal theories at trial. First, that court held that ALPA may have breached its duty of fair representation through "irrational or arbitrary" conduct "if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made" and the pilots had unconditionally abandoned the strike. (App.2 at 11.) In this

4. With respect to the DFR count, the district court also found that the order and award was more than a private agreement between the union and Continental; it was a court order and "[u]nder the circumstances of the existing bankruptcy law, since there was little Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, . . . was essential." (App.3 at 2.)

regard, the Fifth Circuit held, as a matter of law, that if ALPA had abandoned the strike and made an unconditional offer to return, the Railway Labor Act would have entitled full–term striking pilots to displace permanent replacements from the positions awarded under the 85–5 bid. (App.2 at 14.) (ALPA, as we have noted, had negotiated to obtain, under the order and award, the right for strikers to occupy nearly half of the 85–5 bid captain positions.)

In concluding that full–term strikers were entitled to displace Continental's permanent replacement pilots from the 85–5 bid positions awarded during the strike, the Fifth Circuit relied on the Eighth Circuit's opinion in *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *rev'd*, 109 S. Ct. 1225, 1230–33 (1989) (App.2 at 14), but did not cite or discuss this Court's subsequent reversal of the Eighth Circuit. The Fifth Circuit likewise relied on *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), which did not involve positions awarded to working pilots during a strike and did not establish any general entitlement under the RLA to displace permanent replacements from such positions.

Second, the Fifth Circuit held that a factfinder could conclude that ALPA breached its duty of fair representation because the order and award may have impermissibly "discriminated" against full term strikers by permitting permanent replacement pilots to retain some of the 85–5 bid positions they were awarded during the strike. (App. 2 at 14–15.) This result, the Fifth Circuit asserted, was at odds with the RLA because it created a "cleavage" between full–term strikers and permanent replacements after the strike. (*Id.* at 15) (discussing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).) Again, however, the Fifth Circuit ignored this Court's controlling opinion in *TWA v. IFFA* (which limited *Erie Resistor* and held that post–strike employer conduct favoring replacements, virtually identical to that used by Continental

here, does not constitute impermissible discrimination under the RLA).[5]

In its Petition for Rehearing and Suggestion for Rehearing En Banc, ALPA argued that the panel erred in refusing to follow this Court's controlling decisions in *TWA v. IFFA* and *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).[6] The Petition for Rehearing and Suggestion for Rehearing En Banc were denied in an order dated December 27, 1989. (App.2 at 20.)

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5. The Fifth Circuit also rejected ALPA's position that the order and award's approval by the bankruptcy court created a presumption of fairness, adequacy, and reasonableness. (App.2 at 11); *see United States v. City of Miami*, 664 F.2d 435 (5th Cir. 1981).

6. The Fifth Circuit made several incorrect factual statements in its decision as to which there can be no dispute, all of which were brought to that court's attention in petitioner's motion for rehearing. (*See* App. 2 at 4–6.) First, no pilot, no matter what option he chose, was required to waive any claims for unpaid pre-petition wages. (App.4 at 21.) Second, the order and award expressly provided that the seniority list would not be "dovetailed" at the end of the strike and that all striking pilots would retain their prestrike seniority after being recalled by Continental into their initial assignment. (App. 4 at 9, 15.) The 1:1 provision (alternating between striking and working pilots) only related to initial captain positions and was a temporary transition method. Third, while returning strikers had to accept their first assignment from Continental, that is exactly the same right which Continental would have had to assign all returning pilots to available vacancies upon an unconditional return. Fourth, the order and award provides that there will be *no* equipment freeze for pilots who are in positions assigned to them by Continental at the time a new vacancy becomes available for bidding. (App.4 at 6.) None of these factual errors, however, is material under Rule 56, Fed. R. Civ. P.

REASONS FOR GRANTING THE WRIT

Introduction

This case presents three questions, each of which independently calls for this Court's consideration.

First, whether the more exacting standard of fair representation stated in *Vaca v. Sipes*, 386 U.S. 161 (1967) — a case involving the rather straightforward task of *administering* an agreement — governs *all* duty of fair representation cases or whether the less confining standard stated in *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953) — a case involving the polycentric task of *negotiating* an agreement — continues to cover negotiation situations.

The decision below rests on the premise that the *Vaca* standard governs all fair representation cases. Three other circuits read this Court's precedents the other way and have concluded that the *Vaca* standard governs contract administration cases and the *Huffman* standard governs contract negotiation cases. *See Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Thomas v. United Parcel Service*, 890 F.2d 909, 916–19 (7th Cir., 1989); and *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519–20 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989).

It is difficult to conceive of a more critical DFR issue than the content of the basic governing standard, or an issue on which conflict and confusion in the lower courts could be more detrimental to the sound development of this critical area of labor law. As we develop in Part I, *infra*, the Seventh Circuit's thoughtful opinion in *Thomas* makes a powerful showing for the proposition that it is *Huffman* not *Vaca* that governs here.

Second, assuming that the *Vaca* standard applies and a union's performance in negotiations is judged according to an "arbitrariness" or "discrimination" standard, is a union's negotiation decision which rests on an unsettled question of

substantive labor law, or which differentiates between unit members, entitled to judicial deference so long as it is the product of an honest, good faith, and considered judgment or is it subject to *de novo* judicial review as to the correctness of the union's understanding of the law.

The circuit court's ruling that the plaintiffs here have a viable claim for breach of the DFR rests squarely on that court's assumption that Continental's action in filling the 85–5 bid positions exclusively with permanent replacements was *unlawful*, that the striking pilots would have been entitled to displace the successful bidders, and that ALPA was wrong in its determination that the airline's actions might well pass legal muster or would require years of litigation to overturn.

It is of the essence in this regard that the court of appeals analyzed the legal status of the 85–5 bid as if this case were one brought against Continental for violating the Railway Labor Act and thus a case requiring a decision on the merits as to the legality of the bid plan; there is not a word in the opinion below taking account of the unsettled nature of the law at the time or so much as hinting that the union's concerns in this regard are entitled to any deference in this DFR case. In other words, the Fifth Circuit did not accord ALPA any range of reasonableness in making legal judgments — much less the "wide range" called for by *Huffman*, 345 U.S. at 338. Instead, that court second-guessed the union using 20–20 hindsight.

The Fifth Circuit's approach could not be more wrong or more harmful to national labor policy. If that court were right on how such disputed substantive labor law questions are to be resolved in DFR cases, no union could ever settle a labor dispute with any sense of safety. Under such a regime, the already difficult and sensitive task of negotiating agreements in situations in which the employer has demonstrated superior economic power would become all but impossible. That would undermine the policy favoring honest, good faith efforts to consummate such agreements as a means of furthering industrial peace.

Third, whether the Fifth Circuit committed such serious legal error in the following regard to call for the exercise of this Court's supervisory powers: the court below, in ruling on the critical 85–5 bid issue just outlined, ignored this Court's decision in *TWA v. IFFA*, 109 S. Ct. 1225 (Feb. 28, 1989) — despite the fact that *TWA* arose in a closely related context and dealt with nearly identical seniority issues — and relied instead on the Eighth Circuit decision this Court reversed in *TWA* and on *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963), a decision the *TWA* Court found inapposite.

For the reasons already stated, we submit that in a duty of fair representation case, it is unduly harsh to subject a union negotiating decision which involves an unsettled legal issue to *de novo* judicial review on the correctness of the union's understanding of the law. However that may be, it is nothing less than unconscionable to hold that such a union judgment may be so wrong as to be arbitrary or discriminatory even though this Court's most recent decision in an analogous case indicates that the union's understanding of the law was clearly defensible and most probably correct.

The Fifth Circuit rendered just such an unconscionable decision here. The court below refused to do so much as notice *TWA* even though this Court's decision was issued just eight months prior to the issuance of the decision below and even though petitioner ALPA squarely relied on *TWA* in its petition for rehearing which was denied without opinion.

In these circumstances, should the Court conclude that, contrary to our submission, the first two questions presented here do not warrant plenary consideration, we submit that it is necessary to assuring the proper and uniform administration of the federal courts for this Court to grant this *certiorari* petition, summarily vacate the decision below, and remand this case to the Fifth Circuit for reconsideration in light of *TWA v. IFFA*.

I.

There Is A Circuit Conflict On The Legal Standard For Judging Whether A Union Has Provided Fair Representation In Negotiating An Agreement

A. As this Court held in *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 377–78 (1969), "[t]he heart of the Railway Labor Act is the duty, imposed by §2 First upon management and labor...to settle all disputes...in order to avoid any interruption to commerce." Unions, as the employees' exclusive representatives, are vested with the statutory authority to bargain collectively toward that end. RLA §2 Third and Fourth, 45 U.S.C. § 152 Third and Fourth. But as this Court has made clear, the union's

> authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
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> * * *
>
> Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337–38 (1953).

Although this case involved just the sort of delicate negotiating responsibilities accorded deference in *Ford Motor v. Huffman*, the court below proceeded on the premise that there is a single standard for measuring a union's representational activities derived from *Vaca v. Sipes*, 386 U.S. 171 (1967):

> The duty of fair representation owed by a union to its members has been implied by the courts from national labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190. [App. 2 at 9.]

The panel rejected the principle set forth in *Ford Motor v. Huffman* that a showing of "bad faith" or "hostile discrimination" needed to be made by plaintiffs. (App.2 at 9–10.) Indeed, the court below applied an exceptionally searching standard for reviewing the union's decisions here, derived from its earlier decision in *Tedford v. Peabody Coal Co.*, 533 F.2d 952 (5th Cir. 1976). (App. 2 at 10.)

The Fifth Circuit's error in this regard was cogently explained by the Seventh Circuit in *Thomas v. United Parcel Service, Inc.*, 890 F.2d at 916–17. *Thomas* points out that

> As the Eleventh Circuit has recently recognized, "[t]he nature of the duty of fair representation which a Union owes its members is determined by considering the context in which the duty is asserted." *Parker v.*

Connors Steel Co., 855 F.2d 1510, 1519 (11th Cir. 1988), *cert. denied*, _____ U.S. _____, 109 S.Ct. 2066, 104 L.Ed.2d 631 (1989). As such, a number of distinctions must be made in order to achieve the flexibility necessary to realize justice in this area of the law.

We begin by noting that the courts have ordinarily, almost reflexively, deferred to union judgments, regardless of the circumstances. Our deferential stance is premised upon the belief that unions must be permitted to exercise a fair degree of discretion in making the policy choices necessary to secure the good of their members.... The union does not, however, exercise the same degree of discretion in each of its functions....

In any group of even moderate size and diversity, there are bound to be competing claims of entitlement, as well as conflicting opinions as to how best to achieve the common good of the group.... Our refusal to closely scrutinize the choices made by unions in the negotiation context is an acknowledgement of the complexity of the task presented, the range of more or less reasonable options available, and the authority of unions to act as autonomous agents on behalf of their members.

> These reasons carry their greatest force when the union is negotiating a collective bargaining agreement on behalf of its members. It is at that time that our rule of deference is most compelling, for it is during the negotiation of a collective bargaining agreement that the union is required to safeguard and promote the good of its members *in the aggregate*.

The Seventh Circuit then drew the following contrast (890 F.2d at 917–18):

> Once the union is called upon to *administer* a collective bargaining agreement, it assumes a more ministerial role and is therefore entitled to less deference than it enjoyed in the negotiation of the agreement. Once an agreement

> has been reached, the critical value and policy choices have been made and the range of alternatives narrowed accordingly. It is less intrusive, and less an affront to union dignity, for a court to examine whether the union has complied with an agreement *it entered voluntarily* than for that same court to assess the wisdom of the agreement itself.

In the lead case of *Schultz v. Owens–Illinois, Inc.*, 696 F.2d 505 (7th Cir. 1982), this Court declared that "[d]uty of fair representation cases may take two forms:" those claiming a breach in the negotiation of a collective bargaining agreement and those alleging a breach in the administration of such an agreement. *Id.* at 514. The *Schultz* Court correctly viewed *Ford Motor Co.*, 345 U.S. at 330, 73 S.Ct. at 681, as articulating the standard in the negotiation context, with the union afforded a "wide range of reasonableness ... in serving the unit it represents...." *Id.* at 338, 73 S.Ct. at 686.... In the administration of a collective bargaining agreement, *Vaca v. Sipes*, 386 U.S. at 171, 87 S.Ct. at 903, sets the standard, and, in this context:

> "[T]he Court did not ... focus on the inherent difficulties of satisfying the demands of diverse employees as it had in [*Ford Motor Co.*]. Instead, the Court emphasized the union's statutory obligation to represent each individual employee fairly, with a nonperfunctory concern for his complaints and with a nonarbitrary exercise of judgment in evaluating grievances. The application of the *Vaca* standard in the context of grievance procedures does not provide for union discretion within 'a wide range of reasonableness' — in contrast to the collective bargaining standard of [*Ford Motor Co.*]." *Schultz*, 696 F.2d at 515.[7]

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7. So that we are not misunderstood, we note that in *Thomas* the Seventh Circuit went on to caution that the "distinction we have made between the

In sum, as *Thomas* makes clear, this negotiation case would have been judged under a different and more deferential standard in the Seventh Circuit than in the Fifth Circuit. A similar deferential standard would also be applied in both the Ninth and Eleventh Circuits. *Burkevich v. ALPA*, 894 F.2d 346, 349 (9th Cir. 1990); *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1519–20 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 2066 (1989). Moreover, *Thomas'* reasoning set out above demonstrates that it is the Seventh Circuit view — not the Fifth Circuit view — that is faithful to this Court's decisions. *Ford Motor Co. v. Huffman*, 345 U.S. at 337–38.[8]

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negotiatory and administrative stages of the collective bargaining process does not mean that the courts will undertake a *de novo* review of union decisions in the administration of collective bargaining agreements, but only that less deference will be accorded unions serving in that capacity than in the negotiation of such agreements." 890 F.2d at 918–919.

8. The discussion in text only hints at the disarray existing in the lower courts as to the applicable standards in DFR cases, demonstrating the need for plenary review by this Court. For example, in *Thomas v. United Parcel*, 890 F.2d at 917, the Seventh Circuit speaks of a "refusal to closely scrutinize the choices made by unions in the negotiation context" but does not state when it will intervene. The Eleventh Circuit in *Parker v. Connors Steel*, 855 F.2d at 1520, prohibits arbitrary, irrational, or bad faith conduct in negotiation cases and arbitrary, discriminatory, or bad faith conduct in administration cases. In contrast, the Ninth Circuit in *Burkevich v. ALPA*, 894 F.2d at 349, holds that a union must fulfill its procedural functions in a manner which is not arbitrary, discriminatory, or in bad faith but if its conduct involves an exercise of judgment it is limited only by an absence of bad faith or discrimination.

As we have noted, the Fifth Circuit does not distinguish at all between the union's different functions, consistent with the approach taken in the Second, Third, Eighth, Tenth, and D.C. Circuits. *See Morgan v. St. Joseph R. Co.*, 815 F.2d 1232, 1234 (8th Cir.), *cert. denied*, 484 U.S. 846 (1987); *Eatz v. DME Unit of Local Union Number 3*, 794 F.2d 29, 34 (2d Cir. 1986); *Masy v. New Jersey Rail Operations, Inc.*, 790 F.2d 322, 327–28 (3d Cir.), *cert. denied*, 479 U.S. 916 (1986); *American Postal Workers Union Local 6885 v. American Postal Workers Union*, 665 F.2d 1096, 1105–07 (D.C. Cir. 1981); *Eason v. Frontier Air Lines, Inc.*, 636 F.2d 293, 295 (10th Cir. 1981).

Finally, the First, Fourth, and Sixth Circuits appear to recognize a difference between negotiation and administration functions, but have not articulated the clear distinction defined in the Seventh, Ninth, and Eleventh Circuit

B. By applying the standard set forth in *Vaca v. Sipes* to cases involving union negotiations and judgment, the panel invited the trier of fact to determine whether ALPA "arbitrarily" agreed to a back–to–work agreement that was unfavorable or "discriminatory." That is precisely the open–ended inquiry foreclosed by *Ford Motor v. Huffman* and its progeny. The rule of *Ford Motor v. Huffman* subjects the union's exercise of its negotiating judgment to review by a trier of fact *only* to the extent the "arbitrary" or "discriminatory" conduct at issue fails to meet the standard of "complete good faith and honesty of purpose." 345 U.S. at 337–38. The panel, nevertheless, expressly rejected the argument that intentional misconduct or bad faith needed to be shown by the plaintiffs. (App. 2 at 10.) This was inconsistent with *Ford Motor v. Huffman*. *See also Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971) (requiring "substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives"; "deliberate and severely hostile and irrational treatment"), and *Breininger v. Sheet Metal Workers*, 110 S. Ct. 424, 431–32 (1989) (DFR cases "require great sensitivity to tradeoffs between the interests of the bargaining unit as a whole and the rights of individuals," while protecting against "'invidious, hostile treatment'" (quoting *Lockridge*)).[9]

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cases. *See Dement v. Richmond, Fredericksburg & Potomac R. Co.*, 845 F.2d 451, 457–60 (4th Cir. 1988); *Ratkosky v. United Transp. Union*, 843 F.2d 869, 876–78 (6th Cir. 1988); *Smith v. Local 7898, United Steelworkers*, 834 F.2d 93, 96–97 (4th Cir. 1987); *Berrigan v. Greyhound Lines, Inc.*, 782 F.2d 295, 297–99 (1st Cir. 1986); *Ruzicka v. General Motors*, 523 F.2d 306, 309–10 (6th Cir. 1975).

9. In fact, even *Vaca v. Sipes* implicitly recognized that two different standards must exist when the Court referred separately to the duty owed by a union "in its collective bargaining," citing *Ford Motor v. Huffman*, and "in its enforcement of the resulting collective bargaining agreement," citing *Humphrey v. Moore*. *Vaca v. Sipes*, 386 U.S. at 177. *Cf. Communication Workers of America v. Beck*, 108 S. Ct. 2641, 2647 (1988). *Vaca* then addressed itself exclusively to the enforcement and administration context when it limited the union's discretion with an "arbitrary, discriminatory, or in bad faith" standard. *Vaca*, 386 U.S. at 190. In no way did *Vaca* change this Court's earlier statement of the standard in negotiation cases which requires

The panel found that the order and award might be found to be "discriminatory" and a DFR breach under *Vaca v. Sipes* simply because it permitted Continental to treat permanent replacements differently from former strikers. However, unless the different treatment was the result of hostility to some union members, *Ford Motor v. Huffman*, *supra*, or is inherently unlawful such as race discrimination, *Steele v. Louisville & N.R. Co.*, 323 U.S. 192 (1944), such differences do not amount to discrimination violative of the union's duty of fair representation, at least in the context of the union's function as negotiator. *Parker v. Connors Steel*, 855 F.2d at 1519–21; *Schultz v. Owens–Illinois*, 696 F.2d 505, 514–15 (7th Cir. 1982). *See also TWA v. IFFA*, 109 S. Ct. 1225, 1232 (1989) ("inevitable effect" of strike that "differences will be exacerbated and that poststrike resentments may be created").[10]

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the union to act with "complete good faith and honesty of purpose," and "without hostility." *Ford Motor v. Huffman*, 345 U.S. at 337–38.

10. Aside from the terms of the order and award itself, the only issues which the Fifth Circuit identified as possible fair representation claims related to whether ratification by the MEC was required and to alleged oral promises of a right of ratification by the membership–at–large. As to a claimed right of MEC ratification, the Fifth Circuit "accept[ed] for these purposes the pilots' interpretation of union policy," (App.2 at 18 n.4), thereby ignoring (but not reversing) the district court's conclusion that the governing union documents did not require ratification by the MEC and that a "plenary binding general agency" had been properly vested in the MEC officers and Negotiating Committee Chairman to do exactly what they did. (App.3 at 4.) In so doing, the Fifth Circuit improperly ignored the explicit and unambiguous union policy authorizing a strike settlement without ratification of any kind. *Newell v. Int'l Bhd. of Elec. Workers*, 789 F.2d 1186, 1189 (5th Cir. 1986) (union's interpretation of its own constitution and policy guidelines must be accepted by the court unless "patently unreasonable"). As to the plaintiffs' claim that some individuals were "orally assured" of membership ratification (App.2 at 18), that allegation was contained only in Count IV of the Amended Complaint, the dismissal of which was not appealed to the court of appeals. (Amended Complaint ¶55.) Moreover, plaintiffs failed to submit even one affidavit containing admissible evidence which the Fifth Circuit could have credited in deciding that a genuine issue of material fact might exist as to whether any such "assurances" were given.

The Fifth Circuit's failure to recognize the need for greater deference in the negotiation context conflicts directly with the reasoning of the Seventh, Ninth, and Eleventh Circuits in *Thomas*, *Burkevich*, and *Parker*, respectively. Since there was no evidence of bad faith or purpose there can be no question that if the Fifth Circuit had applied the proper standard — the "wide range of reasonableness" set forth in *Ford Motor v. Huffman*, 345 U.S. at 338 — it would have had to conclude, as a matter of law, that the union's actions had met that standard. Nothing in the summary judgment record undermined the district court's finding that ALPA obtained "the best deal that ... [it] thought it could construct" after years of effort. (App.3 at 3.)

II.

Assuming *Arguendo* that *Vaca v. Sipes* Is The Appropriate Standard, Certiorari Should Be Granted To Review The Fifth Circuit's Improper *De Novo* Review Of The Union's Exercise Of Judgment And Its Failure To Consider This Court's Controlling Decision In *TWA v. IFFA*

The Fifth Circuit's opinion eviscerated a union's ability to exercise its discretion and seriously undermined its ability to settle disputes with employers in a manner that avoids any interruption to commerce. Even assuming that the standard under *Vaca v. Sipes* is applicable in a negotiation context, the court below engaged in an extraordinarily intrusive inquiry into the reasonableness of ALPA's balancing of risks and benefits and then improperly substituted its judgment for that of the union. The Fifth Circuit's conclusion that ALPA might be found to have breached its duty of fair representation through "arbitrary" and "discriminatory" conduct was based on two central conclusions of law, both of which were wrongly decided in conflict with this Court's decisions and those of other circuits.

First, the Fifth Circuit wrongly concluded that ALPA should have assumed, even though the law on this point was at best uncertain, that the positions previously awarded to permanent replacements under the 85–5 bid would have been available to returning strikers under an unconditional offer to return to work. Second, the Fifth Circuit concluded that the order and award could be found to have "discriminated" between strikers and non–strikers, but that conclusion directly conflicts with three decisions of this Court.[11] In both instances, if the Fifth Circuit had considered this Court's decision in *TWA v. IFFA*, *supra*, as well as other applicable Supreme Court precedent and decisions of other circuits, it would have affirmed summary judgment for petitioner and would not have left ALPA the burden at trial to provide a rational explanation for its "arbitrary" decision to pursue an order and award containing purportedly "discriminatory" provisions.

A. The Fifth Circuit presumed that all of the jobs covered by the 85–5 bid would have been available to returning strikers under existing law and, therefore, allowed a factfinder to conclude that the order and award was substantially worse than ALPA's existing rights under the RLA. But, as ALPA argued below, it could have required years of litigation to invalidate the results of the 85–5 bid and obtain those positions for returning strikers upon an unconditional offer to return. Also, ALPA's chances of invalidating the 85–5 bid under the RLA were speculative at best.[12] This Court's decision in *TWA v.*

11. *TWA v. IFFA*, 109 S. Ct. 1225 (1989); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963); and *Ford Motor v. Huffman*, 345 U.S. 330 (1953).

12. Whether returning strikers could have displaced permanent replacements from the 85–5 bid positions was only one of several uncertainties facing ALPA. As ALPA argued below, an unconditional offer to return to work would have allowed Continental to take the position that it could refuse to recall strikers to vacant positions if they had obtained other "regular and substantially equivalent employment" or for certain "legitimate and substantial business reasons." *OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir. 1987). Both of these rights were waived by Continental in the order and award. Moreover, recall in seniority order in the event of an unconditional

Independent Federation of Flight Attendants, 109 S. Ct. 1225 (1989), demonstrates clearly the difficulty a union had in 1985 in accurately predicting recall rights of strikers without a written agreement. Nonetheless, the Fifth Circuit held that, "under ordinary seniority rules," the 85–5 bid positions would have been available to returning strikers and "[a] factfinder could infer" that strikers would have been recalled to these positions in seniority order upon an unconditional offer to return. (App. 2 at 14.) In assuming that the 85–5 bid positions were available to ALPA under the RLA, the Fifth Circuit relied on the decision in *Independent Federation of Flight Attendants v. TWA*, 819 F.2d 839 (8th Cir. 1987), which this Court subsequently reversed, *see* 109 S. Ct. 1225 (1989), and on *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D. Ill. 1985), *aff'd in part and rev'd in part*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987), which involved completely different facts and law.[13]

In *IFFA v. TWA*, the Eighth Circuit distinguished between flight attendants who abandoned the strike ("crossovers") and those who were hired after the strike began ("new hires") in determining their permanent replacement status. The circuit court held that crossovers were not permanent replacements and could be displaced from bid positions they obtained during the strike by returning strikers on an unconditional offer to return. Striking flight attendants were held to be permanently replaced only by newly–hired personnel who were actually employed and performing as flight attendants at the end of the strike. 819 F.2d at 842–45. This Court reversed and held that crossovers may be deemed permanent

return was similarly uncertain. *NLRB v. American Olean Tile Co.*, 826 F.2d 1496, 1500–01 (6th Cir. 1987). The order and award also eliminated that uncertainty.

13. This Court's reversal in *TWA* occurred after the briefs on the appeal in the Fifth Circuit were filed, but prior to the panel's decision. ALPA brought this Court's decision to the panel's attention in a letter dated July 6, 1989, filed to advise the panel of recent developments, and in ALPA's requests for rehearing and rehearing en banc.

replacements under the RLA and need not be displaced from positions they obtained during the strike by more senior returning strikers, 109 S. Ct. at 1231–33, even if the crossovers abandoned the strike and were assigned positions only one day before the union unconditionally returned. *Id.* at 1240 (Brennan, J., dissenting). Whether permanent replacements are crossovers or new employees, once they begin service in their craft, as flight attendants there or as pilots here, Continental could have used the *TWA v. IFFA* rationale to argue that returning strikers could not displace working pilots from the positions awarded in the 85–5 bid.

TWA v. IFFA held that an employer can promote and reassign non–striking employees throughout the course of a strike, and may maintain its promise to keep those employees in their newly–assigned positions even after the strike concludes. *Id.* at 1231–33. That decision makes clear that ALPA had a good faith concern that the best it could expect from an unconditional return was that returning strikers could only bid for and obtain the least desirable and entry–level positions. Nothing was left in the Eighth Circuit's decision to support the Fifth Circuit's reliance on it to hold that all, or even any, of the 85–5 bid positions were guaranteed and available to the strikers for the asking. At the very least, the law was thus uncertain as to whether ALPA could have successfully challenged the 85–5 bid job awards under the RLA.[14]

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14. If the Fifth Circuit was relying on another aspect of the Eighth Circuit's ruling which was not reversed, that ruling is still inapposite. The Eighth Circuit ruled that new *applicants* for flight attendant positions who had never worked for TWA were not "employees" as defined by the RLA until they started working, and therefore were not permanent replacements. In contrast, the pilots who were awarded bid positions in the 85–5 bid were already working for Continental, were concededly "employees" under the RLA, and already had permanent replacement status. Thus, the surviving portion of the Eighth Circuit's *IFFA v. TWA* decision provides no guidance as to whether returning strikers could displace Continental's permanent replacement pilots from their positions under the 85–5 bid.

The Fifth Circuit also incorrectly relied on a district court holding in *ALPA v. United*, *supra*, for the same proposition. In *ALPA v. United*, the employer declared as of the first day of the strike that every pilot position was vacant and rebid the entire airline with non–strikers. After only four weeks, the parties settled the strike and United restored all pilots to their original pre–strike positions. However, United insisted on implementing a systemwide rebid after the strike in a manner which benefitted non–strikers over strikers. 614 F. Supp. at 1039, 1045–46. The district court ruled that United presented no valid business justification for implementing the systemwide rebid either during or after the strike and that United had acted unlawfully out of anti–union animus.

On appeal, however, the Seventh Circuit refused to subscribe to the district court's conclusion that the rebid was not justified by a business necessity. 802 F.2d at 899. The Seventh Circuit ruled that the United rebid in favor of non–strikers might be permissible under the RLA even after the strike if United could have shown that the rebid was necessary to induce pilots to cross the picket line as the "first step in rebuilding the airline's pilot structure." *Id.* The United rebid was invalidated not because the "bid positions were not filled until pilots were trained and serving in these positions" as the Fifth Circuit stated (App.2 at 14), but *only* because the evidence showed that the rebid was actually motivated by anti–union animus rather than any business need. 802 F.2d at 899–900.

The *United* holding provided virtually no support for the Continental strikers. It is undisputed that the 85–5 bid was an operational effort by Continental to fill vacancies, in the ordinary course of business under work rules that continued during the strike (App.2 at 3, 13 n.3). Moreover, Continental undoubtedly would have opposed any effort through RLA litigation to invalidate its filling of vacancies under the 85–5 bid with already working permanent replacements, as demonstrated by its September 1985 lawsuit to void the strikers' 85–5 bids. Given Continental's manifest business justification arguments, Continental enjoyed a substantial likelihood of success if ALPA

attempted to invalidate the 85–5 bid results under a *United* rationale. As a result, *United* provides no support for the Fifth Circuit's crucial presumption that ALPA would have invalidated the 85–5 bid results under the RLA in an unconditional return.

Had the Fifth Circuit correctly recognized the rights of returning strikers in 1985, it could not have permitted a fact-finder to infer that ALPA breached its DFR by concluding that the rights of strikers to obtain the 85–5 bid positions were uncertain under the RLA. ALPA's good faith decision to avoid the uncertainty of litigation in order to pursue a negotiated solution that obtained a large portion of the 85–5 bid positions and other benefits cannot, as a matter of law, be found to be "arbitrary" and support a duty of fair representation claim.

B. In addition to its failure to perceive the legal uncertainties confronting ALPA, the Fifth Circuit made a second fundamental error. The district court had concluded that there was no evidence of hostility or intentional misconduct by ALPA (App.3 at 3, 5), and this conclusion was not disputed by the Fifth Circuit. Nonetheless, the circuit court would allow a fact-finder to conclude that the order and award affected some employees differently than others and, even in the absence of any evidence of bad faith, breached the union's DFR because it was "discriminatory." (App.2 at 15.)

Specifically, the Fifth Circuit held that the order and award could be construed to discriminate against striking pilots by permitting Continental to limit the opportunities for promotion available to recalled strikers during the transitional period at the end of the strike. The court was concerned that this result was "'inherently destructive of employee rights,'" noting that the "Supreme Court has expressed special concern for post–strike working conditions which 'create[] a cleavage. . .[between employees] who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority.'" (App.2 at 15, quoting *NLRB v. American Olean Tile Co.*, 826 F.2d 1496 (6th Cir. 1987), and *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).)

Again, however, the court of appeals' holding conflicts with this Court's controlling opinion in *TWA v. IFFA*. In that case, the plaintiffs specifically argued that a carrier's refusal to displace crossovers with senior strikers after a strike constituted unlawful discrimination under *Erie Resistor* because it "will create a 'cleavage' between [strikers and non–strikers] 'long after the strike is ended.'" 109 S. Ct. at 1231 (quoting *Erie Resistor*, 373 U.S. at 231). That is the very same argument made by plaintiffs here. This Court "reject[ed] this effort to expand *Erie Resistor*" beyond its limited facts. 109 S. Ct. at 1232. The Fifth Circuit's decision directly conflicts with *TWA v. IFFA* and signals an expansion of *Erie Resistor* rather than the narrowing signalled by this Court.[15]

Erie Resistor involved an actual change in the seniority list so that all non–strikers would be permanently senior to the strikers. In contrast, the order and award is directly analogous to the post–strike carrier conduct approved in *TWA v. IFFA*, 109 S. Ct. at 1231:

> Thus, unlike the situation in *Erie Resistor*, any future reductions in force at TWA will permit reinstated full–term strikers to displace junior flight attendants exactly as would have been the case in the absence of any strike. Similarly, should any vacancies develop in desirable job assignments or domiciles, reinstated full–term strikers who have bid on those vacancies will maintain their priority over junior flight attendants, whether they are new hires, crossovers, or full–term strikers. In the same vein, periodic bids on job scheduling will find

15. *Erie Resistor* is also inapplicable because it involved a unilateral act imposed by an employer to break a strike and not, as here, a union's right, within its wide range of reasonableness, to negotiate a transitional modification of seniority rights in order to end a strike, regain jobs, and achieve labor peace. *See Metropolitan Edison v. NLRB*, 460 U.S. 693, 705–06 (1983); *NLRB v. Magnavox Co.*, 415 U.S. 322, 325 (1974); *Gem City Ready Mix Co. & Jack Roberts*, 270 N.L.R.B. No. 1260 (1984), 1984–85 CCH NLRB ¶16467.

> senior reinstated full–term strikers maintaining their priority....

All of these statements are equally true under the order and award.

The fact that the employer's efforts to reassign employees during the strike are not completely undone in an agreement ending the strike does not render that agreement unlawful. The employment of permanent replacements will inevitably create resentments and have effects after the strike ends; *TWA v. IFFA* holds that these are the results of permissible employer self–help. Therefore, a union cannot be held liable for failing to undo what the employer is permitted to do. If it can, the RLA's purpose to achieve consensual agreements will be severely undermined. The Fifth Circuit's decision took from the union that discretion given it by Congress and recognized in prior decisions of this Court to be necessary to the discharge of its §2 First obligations to settle labor disputes, and will allow the fact-finder to impermissibly speculate as to the reasons for and wisdom of the union's decision.

III.

In The Event Certiorari Is Not Granted With Respect To The First And Second Questions Presented, Certiorari Should Be Granted To Summarily Vacate And Remand The Action For Reconsideration In Light Of *TWA v. IFFA*

As set forth in Part II, above, the Fifth Circuit's refusal to consider *TWA v. IFFA* made it impossible to apprehend correctly the uncertainty of the strikers' rights under an unconditional offer to return to work or to understand the limited nature of this Court's holding in *Erie Resistor*. By relying on the Eighth Circuit's decision which was reversed in *TWA v. IFFA* and on its own expansive interpretation of *Erie Resistor*, the Fifth Circuit determined that ALPA might be found to have acted arbitrarily and discriminatorily. The rejection of *TWA v. IFFA* raises the need for this Court to preserve the uniform administration of the federal courts. If this Court declines to grant plenary review of the Fifth Circuit's decision, we submit that the decision should be summarily vacated and remanded for reconsideration in light of *TWA v. IFFA*.

CONCLUSION

For the foregoing reasons, petitioner respectfully prays that the Court issue writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit.

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APPENDIX 1

RAILWAY LABOR ACT

SUBCHAPTER I — GENERAL PROVISIONS

45 U.S.C. § 151. Definitions; short title

When used in this chapter and for the purposes of this chapter —

First. The term "carrier" includes any express company, sleeping–car company, carrier by railroad, subject to subtitle IV of Title 49, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier": *Provided, however*, That the term "carrier" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam–railroad system of transportation, but shall not exclude any part of the general steam–railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is authorized and directed upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "carrier" shall not include any company by reason of its being engaged in the mining of coal, the supplying of coal to a carrier where delivery is not beyond the mine tipple, and the operation of equipment or facilities therefor, or in any of such activities.

Second. The term "Adjustment Board" means the National Railroad Adjustment Board created by this chapter.

Third. The term "Mediation Board" means the National Mediation Board created by this chapter.

Fourth. The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation.

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

Sixth. The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them.

Seventh. The term "district court" includes the United States District Court for the District of Columbia; and the term "court of appeals" includes the United States Court of Appeals for the District of Columbia.

This chapter may be cited as the "Railway Labor Act."

45 U.S.C. § 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

45 U.S.C, § 152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

* * *

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be

construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

* * *

SUBCHAPTER II — CARRIERS BY AIR

45 U.S.C. § 181. Application of subchapter I to carriers by air

All of the provisions of subchapter I of this chapter, except section 153 of this title, are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

45 U.S.C. § 182. Duties, penalties, benefits, and privileges of subchapter I applicable

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of subchapter I of this chapter, except section 153 of this title, shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

APPENDIX 2

Joseph E. O'NEILL, et al.,
Plaintiffs–Appellants,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, et al.,
Defendants–Appellees.

No. 88–2848.

United States Court of Appeals,
Fifth Circuit.

Oct. 31, 1989.

Marty Harper, Allen R. Clarke, Lewis & Roca, Phoenix, Ariz., William E. Schweinle, Jr., Reginald H. Wood, Stubberman, McRae, Sealy, Laughlin & Browder, Houston, Tex., for plaintiffs–appellants.

Harold G. Levison, Mudge, Rose, Guthrie, Alexander & Ferdon, New York City, John A. Irvine, Thelen, Marrin, Johnson & Bridges, Houston, Tex., for defendants–appellees.

Appeals from the United States District Court for the Southern District of Texas.

Before POLITZ, DAVIS and DUHE, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Joseph O'Neill, et al., (the O'Neill Group or the pilots) appeal from the district court's grant of summary judgment dismissing their action against the Air Line Pilots Association (ALPA). We vacate the district court's dismissal of the pilots' unfair representation claim, and remand the case to

the district court for further proceedings on this count. We affirm the district court's dismissal of the pilots' claim for relief under section 101(a)(1) of the Labor–Management Reporting and Disclosure Act (LMRDA).

I.

This dispute arises out of the settlement of a two–year strike by ALPA against Continental Air Lines (CAL). The O'Neill Group were ALPA members employed as pilots by CAL, and participated in the strike against the airline.

ALPA has been the authorized and exclusive bargaining representative for the airline pilots employed by Continental Air Lines and its corporate predecessors since the 1940s. CAL and ALPA adopted their most recent collective bargaining agreement in 1982. In 1983, CAL waged a campaign to win substantial financial concessions from its employee groups, including CAL pilots. CAL and the pilots' union ultimately failed to reach a concession agreement and in September 1983, CAL filed a petition for reorganization under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 1101, et seq. CAL then repudiated its existing collective bargaining agreements with ALPA and its other unions, and unilaterally implemented its previously requested concessions as "emergency work rules," including cuts of more than fifty percent in pilots' salaries and benefits.

In October 1983, ALPA initiated a lawful pilot strike in response to CAL's rejection of its labor contract, and filed suit under the Railway Labor Act, 45 U.S.C. § 151, et seq. (RLA), to enforce the collective bargaining provisions. The strike lasted for more than two years, during which time CAL continued to operate by employing cross–overs and hiring large numbers of permanent replacement pilots. The number of working pilots grew; by August 1985, working pilots at CAL exceeded the number of strikers 1,600 to 1,000.

In June 1984, after extended litigation, the bankruptcy court approved CAL's rejection of the ALPA–CAL

collective bargaining agreement, and ordered ALPA and CAL to engage in collective bargaining over the formation of a new labor contract. CAL and ALPA met on and off until late August 1985, when CAL notified ALPA that it was withdrawing recognition of ALPA as the authorized collective bargaining representative of the CAL pilots. ALPA filed suit in the Southern District of Texas in September 1985, challenging CAL's unilateral withdrawal of recognition and its refusal to engage in further negotiations.

As part of its continuing process of filling pilot vacancies, on September 9, 1985, CAL posted "Supplementary Base Vacancy Bid 1985–5." CAL historically provided for future pilot training and staffing needs through its "System Bid" process. Under CAL's System Bid procedure, any pilot interested in a posted vacancy could submit a bid specifying the pilot's preferred positions based on status (*i.e.*, Captain, First Officer, Second Officer), base (city), and equipment type. Once pilots submitted their bids to CAL, vacant positions were allocated solely according to seniority, determined by the date a pilot first flew for Continental. Promotions to vacancies on new or different equipment from which a pilot had been trained required additional training of pilots before the vacancies were actually filled. CAL's bids were posted well in advance of these vacancies in order to schedule this training while maintaining current service. The 85–5 bid announced vacancies to be filled in 1986 for 441 future Captain and First Officer positions and an undetermined number of Second Officer vacancies. All participating pilots were required to submit their bids by September 18, 1985.

Apparently concerned by the number of future vacancies to be awarded under the 85–5 bid, ALPA's Master Executive Council for the CAL pilots (CAL MEC or the MEC),[1] authorized striking pilots to submit bids while also

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1. The CAL MEC is a committee made up of pilot representatives elected by ALPA rank–and–file. The CAL MEC serves as the ALPA coordinating coun-

continuing the strike effort. Confusion over the bids tendered by several hundred strikers and questions concerning the legitimacy of their offers to return to work led CAL to challenge the strikers' bids. In late September 1985, the CAL MEC voted to continue the strike.

During October 1985, CAL and a pilots' committee, drawn from ALPA leadership and the CAL MEC, conducted negotiations under the supervision of the bankruptcy court that resulted in an October 31, 1985 consent agreement termed the "Order and Award." This order and award entered by the bankruptcy court established terms for settling both the ALPA strike and the outstanding litigation between the parties. ALPA consented to entry of the order and award without notice to or ratification by the CAL pilots or the CAL MEC.

The October 31, 1985 order and award altered CAL's standard bidding system for the 85–5 bid and the recall of striking pilots. The agreement established three options for strikers. Striking pilots who wished to return to work were required to choose either option 1 or option 3. Option 1 required strikers to waive all claims against CAL (including claims in bankruptcy for unpaid wages, and damages against CAL for abrogation of the collective bargaining agreement). In return CAL agreed to call them back to work according to "modified" seniority provisions. The relevant "transitional" modifications to seniority order and bid procedures included: (1) current working pilots (nonstrikers) were awarded the first 100 Captain positions in the 85–5 bid. These working pilots were generally ineligible for these positions under an integrated seniority list that included strikers and nonstrikers and standard bidding procedures; (2) the next seventy Captain positions were to be awarded to the seventy most senior returning strikers who waived their claims against CAL, all of whom had been Captains before the strike. In filling these seventy vacancies, CAL had the right to assign these returning strikers to the base

cil for CAL pilots, although its authority is subject to the decisions of the ALPA executive board and board of directors.

and equipment of CAL's choice. Additionally, these returning strikers were required to fly as First Officers for four months before assuming the Captain vacancies; (3) thereafter returning strikers would assume Captain positions on a 1:1 ratio with working pilots, essentially "dovetailing" a striker seniority list with a seniority list for replacement pilots.

The working pilots, following usual bid procedures, were awarded particular vacancies under the 85–5 bid on seniority according to their registered preferences for rank, base and equipment; although CAL recalled former strikers by seniority among strikers, CAL assigned each returning striker to CAL's choice of rank, base or equipment regardless of the pilots' preferences. These provisions had the effect of advancing many nonstriking pilots over more senior striking pilots, and awarding to nonstrikers the majority of the 85–5 Captain vacancies, the most desirable positions. Returning strikers, although recalled in seniority order, were required to accept the position offered by CAL, which could be a rank well below what the pilot was entitled to under seniority bidding procedures. Where a former striker upon recall was assigned initially to a First or Second Officer position, CAL had the right to assign the pilot to the base and equipment of his first Captain position as well.[2]

The Agreement provided for filling Captain vacancies on a 1:1 ratio between striker and nonstrikers until at least October 1, 1988. The practical effect of these "transitional" provisions was foreseeably much longer. For

2. To illustrate the effect of these transitional provisions, the O'Neill Group estimated in December 1987 that the most senior returning striker not yet flying as Captain had 23 years of seniority, held seniority number 65 on the integrated seniority list and flew as a Captain before the strike. The most senior working pilot not yet flying as a Captain had four years of seniority at CAL and held seniority number 1442. In addition, the nonstriker bid for his Captain vacancy, whereas the former striker could be assigned his base and equipment by CAL. (Instr. 163, att. 13). Under the 1:1 ratio prescribed by the Order and Award, these were the next wo pilots to be promoted to Captain.

example, equipment freezes restricted the ability of pilots to change types of aircraft for varying periods of time after being trained on them (typically two years).

Option 3 permitted pilots to keep their claims against CAL, but provided that they could not return to work nor become Captains until after the Option 1 pilots. Option 3 pilots were to be recalled in the order in which they tendered their unconditional offers to return to work rather than in seniority order. CAL retained the same right to assign the Option 3 pilots to vacancies as described above for Option 1 pilots.

Option 2 covered strikers who elected not to return to work for CAL. CAL agreed to pay these pilots severance pay of $4,000 for each year of service, up to a total dollar amount of $2.6 million. In return, the strikers relinquished their right to recall, and released all other claims against CAL.

II.

The O'Neill Group is a certified class comprised of approximately 1,400 past and present CAL pilots who went on strike on October 1, 1983 and remained on strike through October 31, 1985, the date the strike ended. The O'Neill Group brought suit against ALPA, the CAL MEC, and certain individual negotiators in April 1986 for their roles in the strike settlement. In its complaint as amended, the O'Neill Group sought recovery on four counts. Count 1 alleged a breach of the duty of fair representation which ALPA and various ALPA officers owed plaintiffs under the RLA. Count 2 alleged a violation of the voting rights of the plaintiffs, guaranteed under section 101(a)(1) of the LMRDA, 29 U.S.C. § 411. The O'Neill Group also asserted two additional claims not relevant to this appeal.

In August 1987, ALPA moved for judgment on the pleadings and for summary judgment on all counts. The O'Neill Group's response to ALPA's motion for summary judgment was a 150–page memorandum of law and five volumes

of affidavits and other exhibits. The O'Neill Group asserted that the duty of fair representation had been breached by ALPA and various ALPA officers because (1) ALPA failed to allow ratification of the agreement and misrepresented the facts surrounding the negotiations to avoid a ratification vote; (2) ALPA negotiated an agreement that arbitrarily discriminated against striking pilots, including the O'Neill Group; (3) ALPA and various ALPA officers misrepresented to retired and resigned pilots that they would be included in any settlement; and (4) defendants were compelled by motives of personal gain, namely self–interest and political motivations. Concerning the LMRDA section 101 claim, the pilots asserted that they were entitled to vote on ratification of the agreement and order, and that liability under LMRDA is assessed against a union that violates the voting rights of all of its members as a matter of law.

Following oral argument in November 1987, the trial court ruled from the bench, granting ALPA's summary judgment motion and dismissing the pilots' suit. The transcript of the court's general bench remarks following argument provides the only explanation for its ruling.

Rather than finding the settlement "beneficial" as ALPA claimed, the trial court remarked: "that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation," adding that "the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike." The court apparently concluded that the pilots had no legal rights against ALPA because the settlement was issued as a court order, and alternatively because the agreement did not single out particular members for discriminatory treatment. "There is nothing to indicate that the union made any choices among the union members or the strikers who were not union members other than on the best deal the union thought it could construct." With respect to the pilots' claim that ALPA denied their voting rights, the district court concluded that: "in Count 2, the equality within the craft under the cases apparently precludes that claim."

The O'Neill Group appeals the dismissal of Count 1 (duty of fair representation) and Count 2 (LMRDA section 101 ratification rights) of their complaint.

III.

Our task in this case is to review the district court's determinations that no genuine issue of material fact is presented and summary judgment is proper as a matter of law. This undertaking in a complex case with a summary judgment record in excess of 6,000 pages is particularly difficult because the district court's cursory bench remarks provide little help to us in analyzing the issues. As this court reiterated recently, "Although nothing in Fed.R.Civ.P. 56, governing summary judgment, technically requires a statement of reasons by a trial judge for granting a motion for summary judgment, we have many times emphasized the importance of a detailed discussion by the trial judge." *McIncrow v. Harris County*, 878 F.2d 835, 835 (5th Cir.1989), quoting, *Heller v. Namer*, 666 F.2d 905, 911 (5th Cir.1982) (footnote omitted). "In all but the simplest case, such a statement usually proves not only helpful, but essential." *Jot-Em-Down Store (JEDS) Inc. v. Cotter & Co.*, 651 F.2d 245, 247 (5th Cir.1981). "When given such aid, counsel know what issues must be met and the appellate court need not scour the entire record while it ponders the possible explanations." *Id.*

To survive summary judgment, the O'Neill pilots are required to present summary judgment evidence tending to show a genuine issue of material fact. In several recent decisions, the Supreme Court has clarified what is required of the plaintiffs by this standard. "In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). "Rule 56(e) therefore requires the non-moving party to go beyond the pleadings and by. . . affidavits, or by the

'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324, 106 S.Ct. at 2553. Plaintiffs' evidence is to be believed, however, and all justifiable inferences are to be drawn in their favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986). In reviewing the district court's ruling on a motion for summary judgment, we apply the same standard that governs the district court. *Bache v. American Tel. & Tel.*, 840 F.2d 283 (5th Cir.), *cert. denied*, — U.S. —, 109 S.Ct. 219, 102 L.Ed.2d 210 (1988).

A. Fair Representation Claims

The duty of fair representation owed by a union to its members has been implied by the courts from national labor statutes. The Supreme Court has stated that the duty of fair representation imposes on the exclusive bargaining representative "a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 910, 17 L.Ed.2d 842 (1967). More succinctly, "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.* at 190, 87 S.Ct. at 916.

ALPA would have us adopt a standard which requires intentional or deliberate misconduct by the union in order to find a breach of the duty of fair representation. We consistently have held, however, that the Supreme Court's definition of the duty of fair representation enunciated in *Vaca v. Sipes* "recognizes three distinct standards of conduct." *Tedford v. Peabody Coal Co.*, 533 F.2d 952, 957 n. 6 (5th Cir.1976). *See Hammons v. Adams*, 783 F.2d 597, 601 (5th Cir.1986)("[The union's] conduct, however, must not be 'arbitrary, discriminatory, or in bad faith;' a standard that has since been repeated by the Court with only minor rephrasing.")(citations omitted); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467 (5th Cir.1981); *Abilene Sheet Metal, Inc. v.*

NLRB, 619 F.2d 332 (5th Cir.1980); *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 110 (5th Cir.1973). *See also Griffin v. Int'l Union, United Automobile A & AIW*, 469 F.2d 181, 183 (4th Cir.1972)("A union must conform its behavior to each of these three separate standards.... Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for civil action.").

A breach of the duty of fair representation does not require that a union's conduct be taken in bad faith or with hostile discrimination, but may rest upon the arbitrariness or irrationality of the union's acts. *See Bache v. AT & T*, 840 F.2d at 291. Addressing "the arbitrariness standard" this circuit has stated in *Tedford*:

> We think a decision to be non-arbitrary must be (1) based upon relevant, permissible union factors which excludes the possibility of it being based upon motivations such as personal animosity or political favoritism; (2) *a rational result of the consideration of these factors*; and (3) inclusive of a fair and impartial consideration of the interests of all employees.

Tedford, 533 F.2d at 957 (footnotes omitted)(emphasis added).

A breach of the duty of fair representation requires more than a showing of negligence or "honest, mistaken conduct." *Amalgamated Ass'n of Street, etc. v. Lockridge*, 403 U.S. 274, 301, 91 S.Ct. 1909, 1925, 29 L.Ed.2d 473 (1971). *Accord Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570–71, 96 S.Ct. 1048, 1059–60, 47 L.Ed.2d 231 (1976); *Coe v. United Rubber Workers*, 571 F.2d 1349, 1350 (5th Cir.1978)(per curiam)("carelessness or inadvertence neither constitutes nor is evidence of" a breach of fair representation duty). Particularly in the bargaining context, a union's responsibilities permit the exercise of judgment within a wide range of reasonableness, "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Hammons v. Adams*, 783 F.2d at 601, *quoting*, *Hines* 424 U.S. at 564, 96 S.Ct. at 1056. In order to prove a breach of the union's duty to the membership, it is insufficient to show merely "that the union

improperly balanced the rights and obligations of the various groups it represents." *Freeman v. Grand Int'l Bro. of Locomotive Engineers*, 375 F.Supp. 81, 93 (S.D.Ga.), *aff'd*, 493 F.2d 628 (5th Cir.1974).

ALPA argues that the bankruptcy court's approval of the order and award gives rise to a presumption that the settlement is fair, adequate and reasonable. We disagree; all the terms of the settlement the pilots complain of in this litigation had been resolved by ALPA and CAL before the proposed order was submitted to the bankruptcy court. The order and award therefore constituted in essence a consent decree, embodying "primarily the results of negotiation rather than adjudication." *United States v. City of Miami*, 664 F.2d 435, 440 (5th Cir.1981). We agree with the pilots that the bankruptcy court's approval of the settlement does not insulate ALPA's conduct from scrutiny, nor bar the pilots' claims. *See Ibarra v. Texas Employment Com'n.*, 823 F.2d 873 (5th Cir.1987).

We now turn to the pilots' specific arguments of how ALPA breached the duty of fair representation. The pilots' most fundamental complaint is that ALPA's strike settlement was irrational and arbitrary because of the gross disadvantages the pilots suffered under the settlement that they would not have suffered if they had simply surrendered to CAL's demands and returned to work. We are persuaded that a jury would be entitled to infer that ALPA was arbitrary in accepting the strike settlement if it finds that the union should have expected much more favorable treatment for the pilots had the pilots simply given up the strike effort and offered to return to work. In other words, a jury might reasonably find the union's conduct irrational or arbitrary if the union inexplicably agreed to a settlement that left its members in a substantially worse position than if no settlement had been made. We conclude that a jury could find that the order and award left the striking pilots worse off in a number of respects than complete surrender to CAL.

ALPA contends that the strike settlement provided for CAL to reemploy strikers who would not have

otherwise been entitled to return to work at CAL. We disagree. The striking CAL pilots who had not obtained substantially similar jobs (as pilots) continued to be employees of CAL. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378, 88 S.Ct. 543, 545, 19 L.Ed.2d 614 (1967). Because this strike was an economic one, CAL was entitled to hire permanent replacement workers to continue business operations. *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 345–46, 58 S.Ct. 904, 910–11, 82 L.Ed. 1381 (1938). Had the strike terminated without the settlement, CAL was not required to discharge these replacement workers in order to rehire the former strikers. But absent exceptional circumstances discussed below, the returning strikers, as CAL employees, were entitled to reinstatement as vacancies occurred. *Id.*

ALPA asserts several possible justifications which CAL potentially could have offered to avoid rehiring the returning strikers. These justifications include "legitimate and substantial business reasons," and striker "misconduct." *See OCAW v. American Petrofina Co.*, 820 F.2d 747, 750 (5th Cir.1987). But the summary judgment evidence provides no clear basis for this concern. Furthermore ALPA's outside legal counsel advised the ALPA leadership in September 1985 that CAL had not practiced dilatory tactics in reinstating individual strikers who offered to return to work, and consequently he felt such tactics were unlikely should ALPA submit an offer to return on behalf of all strikers. Thus a factfinder could infer that ALPA knew that CAL would not have refused to rehire strikers if ALPA had tendered an unconditional offer for the pilots to return to work.

The most fundamental rights the strikers lost in the order and award were their rights that flowed from seniority. ALPA argues that the pilots had absolutely no assurance that CAL would have recognized any of their seniority rights if they had unconditionally offered to return to work. Thus, ALPA contends that the limited seniority secured by the settlement was beneficial to the pilots. The pilots submitted strong summary judgment evidence however that CAL intended

to reinstate strikers with ordinary seniority rights and privileges after the strike ended.[3] ALPA was advised by its legal counsel in September 1985 that CAL would be obligated to recall strikers in seniority order if they were still employees of the company. Accepting the pilots' evidence as true as we are required to do, a jury could reasonably conclude that if ALPA had unconditionally offered to return the pilots to duty, CAL likely would have returned striking pilots to work according to seniority, and would have permitted strikers to bid for vacancies according to CAL's seniority–based assignment procedures.

Furthermore, if the pilots had unconditionally agreed to return to work, CAL could not have changed its policy of assigning work by seniority, thereby adversely affecting returning strikers, unless it had a legitimate and substantial business justification for doing so. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 1798, 18 L.Ed.2d 1027 (1967); *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 231, 83 S.Ct. 1139, 1147, 10 L.Ed.2d 308 (1963); *George Banta Co. v. NLRB*, 686 F.2d 10, 19 (D.C.Cir.1982); *Lone Star Industries, Inc.*, 279 N.L.R.B. 550, 122 L.R.R.M. 1162 (1986). Yet the order and award allowed CAL

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3. For example, CAL's standard bidding procedures, awarding vacancies to the bidders with highest seniority, were in effect before and during the strike, and were not altered for replacement pilots or for individual strikers who had chosen to return to work. (Instr. 163, atts. 8,9; Instr. 149, exh. 101). CAL stated in a claim filed September 25, 1985 in the Southern District of Texas (hoping to void all 85–5 bids from strikers) that it honored pre–strike seniority of all pilots returning from the strike; that all striking pilots continued to accrue seniority during the strike; and that many strikers were eligible to win their bids for Captain positions under the 85–5 bid because of their seniority levels (Instr. 163, att. 9, ¶¶ 10,32). The record further includes evidence that ALPA discussed the subject with CAL during the September 1985 MEC meetings, and CAL indicated that it would honor an unconditional return and recall strikers in seniority order according to their bids. (Instr. 163, att. 5.5 at 166–69). CAL had returned striking flight attendants and machinists to work in seniority order, with all the benefits and privileges of seniority, after both unions tendered unconditional offers to return to work in April 1985. (Instr. 163 att. 6).

to disregard the seniority of returning strikers in awarding jobs and to assign less senior nonstriking pilots to vacant positions. If a jury accepts the pilots' evidence that CAL likely would have recognized the returning strikers' seniority rights and privileges if they had unconditionally agreed to return to work it could further infer that ALPA was arbitrary in accepting the unfavorable settlement.

We reject ALPA's argument that the 85–5 bid positions were not vacancies at the time the order and award issued because they had been assigned to working pilots by that date. In August 1985, ALPA prevailed on this issue in another suit: a federal district court held that bid positions were not filled until pilots were trained and serving in these positions. *ALPA v. United Air Lines, Inc.*, 614 F. Supp. 1020 (N.D.Ill. 1985), *aff'd in relevant part*, 802 F.2d 886 (7th Cir.1986), *cert. denied*, 480 U.S. 946, 107 S.Ct. 1605, 94 L.Ed. 2d 791 (1987). *See also Indep. Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir.1987). ALPA, in the face of this favorable ruling in an analogous case involving striking United Airlines pilots, approved the terms of the order and award, generally permitting replacement pilots to keep the 85–5 bid vacancies awarded them, except in isolated instances where the transition provisions of the settlement otherwise provided.

In sum, the returning strikers were generally senior to the working pilots and under ordinary seniority rules entitled to fill the vacancies announced in the 85–5 bid. Yet the terms of the order and award gave the nonstriking, working pilots most of these positions. Also returning strikers who wanted to return to work were required to waive any claims for damages they had against CAL. A factfinder could infer that had ALPA unconditionally offered to return the pilots to work, the strikers would have been recalled in seniority order, and would have been able to successfully bid for these vacancies and also preserve their litigation rights against CAL.

The pilots also contend that ALPA breached its duty of fair representation by negotiating a settlement which

impermissibly discriminated against strikers. The pilots argue that the order and award impermissibly preserved strikers and nonstrikers as two distinct groups after recall so CAL could reward the nonstrikers and punish the strikers. ALPA argues it must be given broad negotiating discretion and that agreeing to an arrangement which divides CAL pilots into strikers and nonstrikers for a transitional period is not per se illegal or a breach of its duty to the pilots. The Supreme Court has stated that a wide range of reasonableness must be allowed a bargaining representative in serving the unit it represents, but a union's broad authority in negotiating and administering effective agreements is not without limits. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554.

The Supreme Court has expressed special concern for post–strike working conditions which "create[] a cleavage ... continuing long after the strike is ended. Employees are henceforth divided into two camps: those who stayed with the union and those who returned before the end of the strike and thereby gained extra seniority. This breach ... stands as an ever present reminder of the dangers connected with striking and with union activities in general." *NLRB v. Erie Resistor Corp.*, 373 U.S. at 230. "These are the types of employer action that have been held inherently destructive of employee rights." *NLRB v. American Olean Tile, Co.*, 826 F.2d 1496, 1500 (6th Cir.1987). The pilots have raised a genuine issue of material fact as to whether the adverse, discriminatory post–strike treatment of strikers under the strike settlement can be justified. Depending upon the explanation offered by ALPA, a factfinder might infer that the negotiated division of pilots into strikers and nonstrikers and the subsequent unfavorable discriminatory treatment of returning strikers constituted a breach of the union's duty of fair representation.

B. Ratification Rights

The O'Neill Group asserts in its second count that the union violated section 101(a)(1) of LMRDA by denying the right of rank–and–file members to ratify the settlement agreement.

Section 101(a)(1) of LMRDA states:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

29 U.S.C. § 411(a)(1). Section 101(a)(1) does not grant voting rights where none are conferred by a union's constitution or bylaws; rather it serves to protect the fair exercise of any rights that are provided by the union's constitution and bylaws.

> The law does not require that a collective bargaining agreement be submitted to a local union or the union membership for authorization, negotiation or ratification, in the absence of an express requirement in the agreement, or in the constitution, by–laws or rules and regulations of the union. The statute [LMRDA § 101(a)(1)] does not require submission of proposed agreements or any segments thereof to the membership; nor grant members the right to vote on negotiating, executing and approving contracts.

Confederated Independent Unions v. Rockwell–Standard Co., 465 F.2d 1137, 1140 (3d Cir.1972) (citations omitted). Thus, our first inquiry is to examine whether voting rights were conferred upon the rank–and–file by the ALPA constitution or bylaws.

The ALPA constitution as amended in 1982 provided in relevant part:

> Sec. 2. The conclusion of an agreement shall, at the discretion of the individual Master Executive Council, be subject to ratification.

Both parties agree that the above constitutional provision required ratification by the membership if, but only if, the MEC subjected an agreement to ratification. Thus we must decide whether the CAL MEC had determined that the proposed settlement of the CAL pilots strike required ratification before the order and award was submitted to the bankruptcy court.

The pilots contend that CAL MEC passed a resolution in September 1983 requiring pilot ratification of any agreement giving concessions to CAL. They rely upon this resolution for the right of the membership to ratify the strike settlement of October 31, 1985. The relevant portion of this states: "BE IT FURTHER RESOLVED that the final pilot cost reduction plan will be subject to membership ratification prior to final approval and implementation."

This resolution was passed by the CAL MEC during a meeting in which the MEC was debating whether to participate in a $150 million cost reduction plan for all CAL employees. CAL had been in financial trouble for some time, and in September 1983 had submitted specific cost reduction proposals to its employee groups. A $60 million package of pay, benefits and productivity concessions was submitted to the CAL pilots, embodied in a document known as the "New Continental Pilot Employment Policy." In its September 19 resolution, the CAL MEC agreed in principle to participate in the $60 million cost reduction plan, but sought to negotiate over its specific terms. The MEC further resolved that the final cost reduction plan would be subject to membership ratification. CAL and ALPA did not agree on a final plan, and on September 24, 1983, CAL filed a bankruptcy petition.

The language of this resolution is unambiguous. It does not grant a blanket right to the membership to ratify all future strike settlements; it plainly accords to the membership the right to ratify the "final cost reduction plan" under discussion at that time. This resolution by its plain language does not support the pilots' asserted right to ratify the strike settlement agreement reached more than two years later.

The pilots further contend that MEC officials orally assured the pilots throughout the strike that the rank-and-file would be able to vote on any strike settlement.[4] A factfinder might infer a breach of ALPA's duty of fair representation if it finds the union misrepresented the right of the membership to ratify any settlement agreement. *Cf. Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1397 (9th Cir.), *cert. denied*, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986)("a duty of fair representation cause of action can be maintained when union representatives make misrepresentations to the union membership during the ratification process"); *Christopher v. Safeway Stores, Inc.*, 644 F.2d 467, 472 (5th Cir.1981). But misrepresentations by individual MEC members or union officials to pilots do not provide the necessary express grant of a ratification right to the rank-and-file members that is required to support an action under section 101(a)(1).

Ordinarily a ratification right accorded a union's membership is contained in the union's constitution or bylaws. Here the constitution delegated authority to the MEC to decide which agreements the members were entitled to ratify. According to the CAL MEC's policy manual, MEC policy is to be established, amended or rescinded by a majority vote of the MEC. Certainly assurances by individual MEC members to rank-and-file members of a ratification right are not decisions of the MEC body. Where the voting right is not contained in the constitution and bylaws any provision for membership

4. The pilots also argue that section 101 was violated because the union failed to obtain MEC approval for the settlement as required in the MEC policy manual. But section 101 only secures certain rights of the rank-and-file members to vote and to participate in their union affairs. Thus, accepting for these purposes the pilots' interpretation of the union policy, the union's violation of the policy by refusing to allow MEC to approve the settlement is not actionable under section 101 because it is not a right granted to the rank-and-file membership. The pilots have the opportunity on remand to persuade the district court that if the policy requiring MEC approval was violated, this is a predicate for recovery on their unfair representation claim.

ratification must be clear and unambiguous; to trigger section 101 protection the voting right must be expressly granted according to established policymaking procedures. To imply a voting right where none is clearly provided would impermissibly interfere with the union's organizational structure. *See Calhoon v. Harvey*, 379 U.S. 134, 140, 85 S.Ct.292, 296 13 L.Ed.2d 190 (1964). In sum, we agree with the district court that the union members had no right to approve the settlement embodied in the order and award. Summary judgment was proper as to this claim.

C. Conclusion

Based on our review of the summary judgment record, we find at least two critical issues of material fact that preclude summary judgment on the union's duty of fair representation claim. First, a factfinder may infer that the settlement agreement negotiated by ALPA was so less favorable to the striking pilots than the likely consequences of a total surrender of the strike effort as to be arbitrary and a breach of the union's duty to fairly represent its members. A jury would also be entitled to find that the agreed-to settlement provisions breached the union's duty of fair representation because it impermissibly and unjustifiably divided the CAL pilots after recall into two camps of former strikers and nonstrikers and permitted CAL to discriminate against strikers. It is unnecessary for us to decide whether additional issues of fact are presented on this claim. We agree with the district court's dismissal of the pilots' section 101 voting rights claim.

The judgment of the district court is therefore VACATED and the case REMANDED for further proceedings consistent with this opinion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2848

JOSEPH E. O'NEILL, ET AL.,

Plaintiffs-Appellants,

versus

AIRLINE PILOTS ASSOCIATION,
INTERNATIONAL, ET AL.,

Defendants-Appellees.

Appeals from the United States District Court for the
Southern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion October 31, , 5 Cir., 1989, F.2d)

(DECEMBER 27, 1989)

Before POLITZ, DAVIS and DUHE, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ W. Eugene Davis
United States Circuit Judge

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSEPH E. O'NEILL, PHILLIP M. ORDWAY, JACK E. PENDELTON, CHARLES RICE, WILLIAM S. AGEE, D. L. BAKER, JAMES D. BATEMAN, H. M. BAUER, ROBERT F. BEAGLE, JAMES H. BEERER, MICHAEL J. BERNARDO, DAVID L. BIGELOW, DONALD G. BJORKLUND, WALTER E. BLORE	• CIVIL ACTION • NO. H-86-1718
versus	• Houston, Texas • November 30th, • 1987 2:30 P.M.
AIRLINE PILOTS ASSOCIATION INTERNATIONAL, CONTINENTAL AIRLINES MASTER EXECUTIVE COUNSEL, HENRY A. DUFFY, D. KIRBY SCHNELL, R. PETER LAPPIN DONALD A. HENDERSON	•

COURT'S RULING
BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Defendants:

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Alexander & Ferdon
BY: Mr. Harold G. Levison
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For the Plaintiffs:

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BY: Mr. Marty Harper
Mr. Allen R. Clarke
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Stubbeman, McRae,
Sealy & Browder, Inc.
BY: Mr. Reginald H. Wood
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Houston, Texas 77002

THE COURT: Thank you. Be seated.

Even though the hour is late, I am going to give a general outline of my judgment in this case and produce a written document. The written document may vary a little because I may omit things or modify it, but I think the parties, for their own purposes, need to know the general nature of the resolution as soon as possible.

I am going to grant the Defendant's Motion For Summary Judgment.

I think the order signed by Judge Roberts is inescapably an order. Under the circumstances of the existing bankruptcy law since there was little that Continental could do without the approval of the Court, the approval of the Court in this instance, however minor, the Court's contribution to the terms of the resolution, the Court's participation was essential.

Now, that's a fairly narrow holding and I am not saying all agreed orders are not contracts and similar things, but under the circumstances of this case, beyond that, in the alternative, I am not going to rule under Count 1 on the nature

of the resulting relationship between Continental and a retired pilot because the retirement questions are subjudice elsewhere.

So assuming that the October 31 transaction were merely an agreement, the Court finds that the Union did not breach its duty of fair representation.

There is nothing to indicate that the Union made any choices among the Union members or the strikers who were not Union members other than on the best deal that the Union thought it could construct; that the deal is somewhat less than not particularly satisfactory is not relevant to the issue of fair representation.

In Count 2, the equality within the craft under the cases apparently precludes that claim.

As I've indicated before, that in no way means that either Congress or the Court intended to cleanse or approve of failing to do something that they should do to everyone.

That may save it from that statutory violation, but that's not an endorsement of practice.

The variation on the theme in Count 3 under the various sections of the statutes has the same result and that is that the activities of the Union may be characterized as sloppy, ineffectual, short–sighted or some other value judgmental result, but that is not the same as to say it is a violation of a statutory duty to any particular pilot or group of pilots.

The Court is concerned about the August 1984 resolution being secret. It, of course, was not secret from the 9–member committee who purportedly represented the Union, but I do not think it is properly part of the policy of this operating division of ALPA.

However, that's not much comfort to the Plaintiffs because what was done through other meetings was sufficient, I think, to confer authority on the negotiating agents for the MEC, who were the general agents for the membership.

I have seen nothing in the documents that would preclude the conferring of a plenary binding general agency on some representative sent to negotiate the contract, whether it's a working agreement or a back–to–work agreement.

The Court does not then need to decide whether a working agreement is categorically different from a back–to–work agreement in this case and, therefore, not subject to the strictures of Section 17 Policy Manual.

It seems to the Court that the circumstances, it would make a back–to–work agreement susceptible to short, dead lines, crises of operation, crises of administration and other limitations in the orderly process of the Union would also frequently be true of the ordinary working agreement negotiations.

The failure of the Union to follow a number of the procedural steps, while bad practice and undesirable policies, does not amount in this case as a matter of law to a breach of fiduciary duty.

Since the agreement that was achieved looks atrocious in retrospect, but it is not a breach of fiduciary duty badly to settle the strike and I suspect if all the parties had it all to do all over again, most of them would have adopted different tactics throughout the entire labor problems with Continental.

The loss to the Plaintiffs, while not technically money or property under the cases, are rights of considerable economic importance.

Count 4 which I earlier characterized as a common law breach of fiduciary duty falls for essentially the same underlying, undisputed fact reasons that the statutory claims under Count 3 fall and that is that none of the statutes nor common law entitle the pilots to a risk–free choice in their decisions in dealing with what was indisputably a hostile intransigent employer.

It is only natural and human for the pilots to feel displeased with the Union. That does not amount to a breach of

the Union's fiduciary duty to this group or its individual components.

I don't think that the behavior of the Union has been shown to have any segment of proclivity to it except in the pilots' view that they ultimately end up cooperating with Continental Airlines.

From that fact alone and from the fact that they used every tactic available to them to insure that their resolution of the dispute would not be upset cannot be translated into personal animosity or illegal motives against these pilots.

Although I don't think the Court needs to reach it, the Court is somewhat troubled by the argument that ratification was not necessary because it wasn't a labor agreement because we didn't cover everybody and couldn't cover everybody because we weren't the bargaining agent any more.

That seems to me to be fairly circular and to say it was all right to violate your agency with these pilots because to attempt to represent them completely would have required that you violate the Railway Labor Act and to put it ahead of their policies doesn't seem substantial.

I don't understand the labor law to have precluded the Union from having discussed the future of non–Union strikers or other conditions and terms of Continental's employment practices that might affect people other than their direct membership.

If I am wrong about that, you can supply me a case; but so far I have not understood anything in these statutes to have precluded the Union from structuring a larger settlement than its membership alone, and I'm obviously not deciding whether or not ALPA was the designated bargaining representative for Continental at this time. That's covered by the other case, too, I believe.

All right. That may not be as lucid as it ought to be, but I'm either sorry or grateful that I do not spend as much

time in labor law as you gentlemen do. I am sorry you counsel do, but I will try to write it down so it will make sense and you can file your Motion For Reconsideration.

Anything further this afternoon?

MR. LEVISON: No, Your Honor.

MR. HARPER: Thank you, Your Honor.

THE COURT: Thank you, counsel.

APPENDIX 4

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	:
CONTINENTAL AIRLINES CORPORATION,	:
CASE NO. 83-04019-H2-5	:
	:
CONTINENTAL AIR LINES, INC.,	:
CASE NO. 83-04020-H1-5	:
	:
TEXAS INTERNATIONAL AIRLINES, INC.,	:
CASE NO. 8304021-H3-5	:
	:
TXIA HOLDINGS CORPORATION,	:
CASE NO. 83-04022-H3-5	:
DEBTORS	:
	:
CONSOLIDATED UNDER	:
	:
CASE NO. 83-04019-H2-5	:

ORDER RELATIVE TO CLAIMS,
CONTROVERSIES AND RELATED LITIGATION

This matter has come on before the Court upon the joint motion and request of the above-named Debtors (hereinafter "Continental") and the Air Line Pilots Association, International (hereinafter "ALPA"), for the entry of an Order resolving their pending claims, controversies and related litigation.

Pursuant to orders of this Court dated July 2, 1985, Continental and ALPA have been engaged in lengthy and complex negotiations to settle and compromise their disputes, to end the ongoing ALPA strike against Continental, to resolve all other pending claims and litigation and to assure a fair and

equitable treatment of all pilot employees of Continental — those now at work and those on strike. Settlement discussions between Continental and ALPA have continued non-stop since October 18, 1985. Continental and ALPA have consented to have this Court resolve all outstanding issues submitted to this Court.

After considering all matters and issues before the Court as between Continental and ALPA, this Court, in the exercise of its equitable powers pursuant to Section 105 of the Bankruptcy Code, and as an interest arbitrator pursuant to the agreement and consent of ALPA and Continental, hereby makes the following findings and orders:

1. Continental and ALPA have consented in open Court on October 30 and 31, 1985 to the entry of an Order by this Court, both in its Judicial capacity and as a Interest Arbitrator (the latter designation having been specifically requested, agreed and consented to by Continental and ALPA in open Court on this date) to render a final, binding, non-appealable decision on all outstanding issues as between Continental and ALPA; and

2. Continental and ALPA have further agreed in open Court, both by and through statement of counsel and by authorized representatives on October 30, 1985 to waive any right to appeal, modify or otherwise challenge the decision and award of this Court with respect to all issues as between Continental and ALPA.

Based on the foregoing, it is accordingly ORDERED, ADJUDGED and DECREED:

1. The determination and resolution of claims and controversies is set out in Exhibit "1"; and

2. Continental and ALPA are ordered and directed to take such steps as are necessary to implement in Exhibit "1" to this Order; and

3. Continental and ALPA are ordered and directed to file such pleadings as are necessary to dismiss all litigation pending between them in the Bankruptcy Court, any United States District Court, any United States Courts of Appeals, or otherwise, as such litigation is more specifically set out in attachment "B" to Exhibit "1" hereto.

It is so ORDERED, ADJUDGED AND DECREED this 31st day of October, 1985.

/s/
T. GLOVER ROBERTS
UNITED STATES BANKRUPTCY
JUDGE

ORDER AND AWARD

I. *Termination of Strike and Back To Work Issues*

A. *General*

1. ***Termination of Strike.*** Effective with the entry of this Order and Award, ALPA shall terminate its strike against Continental Airlines and all picketing, job actions, boycotts, disparagement and public statements by ALPA, (or any ALPA spokesman, representative, officer or agent) critical of the pilots or operations of Continental Airlines and all other strike–related activities directed against Continental, or any affiliate of Continental shall cease.

2. ***No Recrimination or Retaliation.*** No pilot shall be subject to discrimination, fines or harassment, either by ALPA or by the Company, due to legally protected strike activities, work during the strike or service as a replacement pilot during the strike period. These assurances against recriminations or retaliation expressly apply to employment or reemployment at Continental or at another employer. This will not affect ALPA's right to determine who will be continued as a member or readmitted to membership.

3. ***Terminated Pilots.*** All striking pilots terminated for cause between September 24, 1983 and the date of this Order and Award, except those convicted of a felony offense, shall have the right to submit their cases to arbitration, as provided in Section V below; such pilots shall not be eligible to elect to return to work unless and until reinstated as a result of such arbitration.

B. *Reinstatement Rights and Procedures*

1. ***Right to Reinstatement*** All pilots on the July 31, 1983 seniority list who are not currently active or on authorized leave and who have not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to section I.A.3.) shall be eligible to elect recall and reinstatement in accord with the procedures set forth herein. All such pilots who elect recall and resolution of their claims against Continental, its employees and affiliates, as provided in Section III.B.1., infra, shall be placed on a new preferential recall list in seniority order, and shall be treated for purposes of this Order and Award as having made an offer to return to work as of September 15, 1985. Such a pilot who elects recall but does not wish to resolve his/her claims in said manner shall be placed on the recall list and recalled subsequent to the recall of waiving pilots in the order in which his/her unconditional offer to return to work was received by Continental.

2. ***Filling of Vacancies.***

(a) *New Vacancies.* All future vacancies will be made available to eligible working pilots and returning strikers in accord with the provisions of this paragraph 2. "Vacancy" as used herein means any unstaffed pilot position which results from systemwide expansion or attrition; a redistribution of aircraft or flight time which does not result in a net increase in the total number of system Captains or the total number of system First Officers does not create a "vacancy". No working pilot (including training, supervisory and management pilots) shall be displaced in status from his/her awarded bid position as a result of the return to work of a striking pilot. Except as provided in sub–paragraphs (b) and (c) below, striking pilots who are reinstated will thereafter bid with working pilots and pilots on approved leaves of absence for all new vacancies. A pilot who has elected the Recall Option must thereafter accept a vacancy offered to him/her; a pilot who declines to accept such a vacancy shall be removed from the seniority list and shall have no further rights under this Order and Award. A pilot has an obligation to keep Continental current on his/her address for contact.

(b) *Initial Assignments.* The status of a returning striker (Captain, First Officer, Second Officer) shall be determined on the basis of seniority among available vacancies in accord with the provisions of subparagraph (c), infra, provided that (1) any pilot who was not holding a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of 24 months prior to his/her return to service shall be required to fly six (6) months in a First Officer position before being eligible for assignment to a Captain position; and (2) any pilot who held a Captain position as of September 24, 1983 and who has been out of Continental service for a period in excess of twenty–four (24) months prior to his/her return to service, shall be required to fly four (4) months in a First Officer position before being eligible for assignment to a Captain position. The initial base and equipment of a returning striker shall be assigned by the Company; the base and equipment of a returned striker in his/her initial post–strike service as a Captain may also be assigned by the Company. Thereafter base and equipment will be determined in accord with the Pilot Employment Policy.

(c) *Allocation of Vacancies: Transitional Provisions.* In light [of] the unique circumstances of this Order and Award, current and future vacancies shall be allocated in accord with the following provisions of this subparagraph (c).

(i) All pilots awarded positions on Vacancy Bid 1985–5 shall receive the position awarded, subject only to delay to a date necessary to accommodate the return of striking pilots in accord with the provisions of this paragraph (c). The Company may reallocate the awarded vacancies on that bid to different equipment within status where necessary to accommodate changes in the projected fleet, provided that the total number of awarded vacancies by status shall not be increased by such an adjustment.

(ii) Currently working pilots shall assume the first 100 Captain positions awarded in Vacancy Bid 1985–5. Subject to the provisions of subparagraph (b), the next 70 Captain positions shall be awarded in seniority order to returning strikers who have resolved their claims against

Continental, its employees and affiliates, as provided in Section III.B.1., infra. Thereafter returning strikers shall assume Captain positions on a 1:1 ratio with working pilots (i.e. every other Captain position to a returning striker); said ratio shall remain effective unless and until changed as provided in subparagraph (c)(v) below. The award of 70 Captain positions to such returning strikers shall commence no later than May 1, 1986 and be accomplished no later than August 1, 1986. In the event any of these positions is not available by August 1, 1986, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position.

(iii) The Company will make available to returning strikers who have resolved their claims against Continental, its employees and affiliates, as provided in Section III.B.1.–2., infra, 70 First Officer vacancies, commencing as of January 1, 1986, on a schedule sufficient to allow returning strikers to assume the 70 Captain positions made available by subparagraph (c)(ii), supra. Thereafter, the Company will award sufficient First Officer positions to returning strikers to provide for advancement to Captain in accordance with the schedule and ratio set forth above.

(iv) Following the award of 70 Captain positions to returning strikers, additional captain positions are projected to become available according to the following schedule, to be filled by working pilots and returning strikers on a 1:1 basis:

(a) 46 additional Captain positions by 10/1/86;

(b) 46 additional Captain positions by 1/1/87;

(c) 46 additional Captain positions by 7/1/87;

(d) 46 additional Captain positions by 1/1/88;

(e) 46 additional Captain positions by 7/1/88.

In the event any of the foregoing Captain positions is not available by the projected date, the Company will pay protect each adversely affected First Officer at Captain rates of pay until that First Officer achieves a Captain position. In the event of increases to staffing requirements, the projected Captain vacancy schedule will be accelerated accordingly and will continue to be allocated on a 1:1 basis between working pilots and striking pilots.

(v) The 1:1 ratio for filling Captain vacancies shall remain in effect until October 1, 1988. The question of what ratio for Captain vacancies should remain in effect beyond that time shall be submitted to final and binding arbitration in accord with the following provisions. The arbitrator or the method for selection of the arbitrator shall be designated by the parties in a side agreement. Either the Company or any affected pilot may request the commencement of an arbitration proceeding on or about April 1, 1988. The Company or the affected pilot shall thereupon notify the arbitrator and the parties shall jointly schedule an arbitration, which must be commenced within sixty (60) days of the initial request. The arbitration shall be conducted in accord with the rules and procedures of the American Arbitration Association and any resulting Award shall be subject to review and/or enforcement under the U.S. Arbitration Act. The affected pilot(s) may designate any personal representative to appear in his(their) behalf. The arbitrator shall take into account all relevant facts and circumstances in reaching his decision; in no event shall the final ratio be zero for either the working pilots or the striking pilots.

(vi) Striking pilots awarded the first 70 First Officer positions which become available to returning strikers shall not be assigned a Second Officer vacancy in the interim; all other returning strikers must accept assignment to available vacancies in seniority order subject to the provisions of this paragraph 2.

(vii) For purposes of this Order and Award, "returning striker" means a pilot on strike as of September 15, 1985 (including those then on the preferential recall list) who

elects recall pursuant to the terms of this Order and Award; "working pilot" means a pilot in active service (including flight instructors, supervisory and management pilots), in training, or on authorized leave as of September 15, 1985. New hire pilots who received employment commitments prior to September 15, 1985, but entered training thereafter shall be entitled to hold Second Officer positions until entitled to advance to other positions in accord with the Pilot Employment Policy. It is understood that the Company may advance the dates of assignment as Captains (subject to the provisions of subparagraph b).

(d) *Reductions In Force.* In the event of a future reduction–in–force, pilots will be displaced in status and/or furloughed on the basis of seniority; in any subsequent recall, pilots displaced or furloughed as a result of the reduction in force shall be reinstated in their former positions prior to (1) the advancement in status of any other pilot to such positions and (2) the recall of any pilot then on the preferential recall list.

3. ***Seniority List.***

(a) The CAL/TXI integrated pilot seniority list effective July 31, 1983, will be revised by deleting all pilots who have resigned, retired, elected severance, not responded to the Notice in paragraph 5(a) below, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.). Pilots presently classified as permanently disabled will be treated in accord with subparagraph (b), below. Pilots on furlough status as of September 24, 1983 who are not currently active or on authorized leave may have their seniority adjusted to reflect credit only for periods of active service in accord with subparagraph (c) below. All pilots hired since October 1, 1983 will be placed on the revised list in order of date of hire and date of birth within training class. The new list will be published forthwith.

(b) Pilots on permanent disability status as of the date of this Order and Award will be given the option to elect a return to active service, or alternatively, to be removed from the Seniority List, in accord with the following procedures. Each such pilot will be notified of his options in accord with Section I.B.5. of this Order and Award; a pilot who

elects to pursue recall will be given a medical and/or psychiatric examination (as appropriate, based on the nature of disability) by a Company–selected medical examiner on or before January 15, 1986 to determine eligibility for recall. If the pilot is deemed by the medical examiner to be medically certifiable for active flight duty on or before December 31, 1988, such pilot will be retained on the seniority list and will be activated as soon as medically qualified; such pilot will remain on permanent disability status until activated. If a pilot should fail to so qualify for active flight duty on or before December 31, 1988, or voluntarily elects not to seek recall, his name shall be permanently removed from the seniority list and he shall have no further rights of recall or reinstatement; the disability benefits of such a pilot shall continue without interruption.

(c) Pilots on the integrated pilot seniority list effective July 31, 1983 who were on furlough status as of September 24, 1983 and who are not currently active or on authorized leave shall remain on the seniority list in accord with the provisions of this paragraph. The seniority and seniority number of such striking pilots holding seniority numbers up to and including No. 1897 shall remain intact and unaffected. The seniority and seniority number of such striking pilots holding numbers 1898 through 2025 will be subject to a seniority integration process with pilots hired since September 24, 1983 whereby each such returning furloughee will be assigned a revised seniority number upon the earlier of (1) his return to pay status or (2) January 1, 1987; the revised seniority number will be based on that pilot's length of active service as of the date of such assignment in relationship to the length of active service of pilots hired since September 24, 1983, i.e. the returning furloughee's new seniority number will be in rank order behind a pilot with more time in active service and ahead of a pilot with less time in active service. Time on leave, on furlough, on strike or awaiting recall does not constitute active service for purposes of this Section. This Order and Award modifies the Seniority Integration and Fence Agreement executed August 18, 1982 and the integrated seniority list issued pursuant thereto.

4. ***Retention of Recall Rights.*** All pilots electing the option of returning to work will retain their right to reinstatement until December 31, 1988; if such a pilot has not been reinstated by that date, his/her name shall be removed from the seniority list and s/he shall have no further right to recall or other rights under this Order and Award; provided, however, that in the event of a reduction in force commencing between the date of this Order and Award and December 31, 1988, the period of time during which recall rights remain in effect shall be extended beyond December 31, 1988 for a length of time equal to the length of time such a reduction in force remained in effect.

5. ***Notification and Recall Procedures.***

(a) Within ten days of the date of this Order and Award, the Company shall mail the attached Notice of Options to all striking pilots to advise them of their options under this Order and Award. (Notice to be drafted as Attachment A).

(b) All pilots so notified in writing will have twenty–one (21) days from their receipt of said Notice to advise the Company in writing of their intent to return to work or elect any other option(s) made available to them by this Order and Award. A pilot who receives said Notice, or who refuses or avoids said Notice, and fails to respond and elect his options within the time specified shall have his/her name removed from the seniority list and shall have no further rights under this Order and Award.

(c) If the Company is unable to notify a pilot concerning reinstatement and other options made available by this Order and Award, the Company shall temporarily bypass for reinstatement such pilot. The Company and ALPA shall attempt to locate such pilot and deliver said Notice for a period of forty–five (45) days from the date of mailing her/his Notice. If such pilot has not then been located by either party and acknowledged receipt of the Notice of Options his/her name will be removed from the System Seniority List and he/she shall have no further rights under this Order and Award.

(d) For the purposes of this Section, "notified in writing" means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

(e) A pilot electing reinstatement will subsequently receive a separate Recall Notice specifying a scheduled reporting date for training. Upon recall, a pilot will be allowed at least fourteen (14) days, from the date of the recall notice, to report for training. A recalled pilot shall confirm to the Company in writing within five (5) days of receipt of recall notice that he will return to service and report for training as scheduled. A pilot who fails to confirm his intention to return or to actually report for training within the time frame specified above will be considered out of the service of the Company and his/her name will be removed from the System Seniority List. For the purposes of this paragraph all required written notices between the Company and the pilot means attempted delivery to the last known address by the U.S. Postal Service of a letter sent Certified Mail, marked "Deliver to Addressee Only" and return receipt requested.

6. ***Medical Qualification of Returning Pilots.***

(a) Each returning pilot must complete a Company physical and psychological examination. Additionally, each returning pilot must maintain a Class I Federal Aviation Administration Medical Certificate; however, those returning to First and Second Officer positions may utilize the Class I FAA Medical Certificate for a period of twelve (12) months or as consistent with Federal Air Regulations. If a pilot cannot maintain the Class I certificate, s/he will so notify the Company in writing and will thereafter be permitted to bid only for vacancies in a status which his/her medical certificate, seniority and FARs allow him/her to hold.

(b) In the event a pilot fails to pass the Company physical examination, the following procedure will

apply except in those cases where disqualifying drugs have been detected in the drug screen test*:

(i) A copy of the findings of the Company medical examiner shall be furnished to the pilot within fifteen (15) days. In the event that the pilot disagrees with such findings, the pilot may, within seven (7) days, employ a qualified medical examiner of his/her own choosing and at his/her own expense for the purpose of conducting a second medical examination.

(ii) In the event that the findings of the medical examiner chosen by the employee disagree with the findings of the medical examiner employed by the Company, the Company will, at the written request of the employee, given within seven (7) days of such disagreement, ask that the two medical examiners agree upon and appoint a third, qualified and disinterested medical examiner, preferably a specialist, for the purpose of making a further medical examination of the employee.

(iii) The said disinterested medical examiner shall then, as soon as practicable, make a further examination of the pilot in question and the case shall be settled on the basis of his/her findings. Copies of such medical examiner's report shall be furnished to the Company and to the pilot as soon as practicable.

(iv) The expense of employing the disinterested medical examiner shall be borne one–half by the pilot and one–half by the Company.

7. ***Compensation While in Training.***

A returning pilot in training at a place other than his/her last home base shall be provided lodging, transportation and per diem as specified herein:

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* A pilot adversely affected as a result of a drug screen test shall have the right to grieve any adverse action in accord with the Pilot Employment Policy.

(a) Pilots shall be provided suitable single room accommodations and shall be provided, or reimbursed with proper documentation, reasonable transportation to and from the training facility and the airport.

(b) The Company shall teletype an on–line, round–trip positive space (PS–5) pass authorization to the on–line city nearest such pilot's location if s/he is not residing in the city where his/her training is to be provided. Such passes shall be available at the ticket counter and valid for use two (2) days prior to the pilot's scheduled report date for training until two (2) days following the day his/her training is completed. If the pilot is unable to travel during these two (2) days due to passenger loads, his/her pass authorization shall be renewed as needed. A pilot who is unable to travel to training due to passenger loads shall be offered and assigned alternative training sessions and s/he shall not have his/her return to active duty affected due to his/her inability to travel.

(c) The Company shall teletype an on–line positive space (PS–5) pass authorization to the on–line city nearest a pilot's location in order for him/her to report for his/her first day of duty with the Company if s/he does not reside in the city where his/her Home Base Domicile is located. Such pass shall be valid for use two (2) days prior to the date s/he is scheduled to report for duty with the Company.

(d) A pilot, when in training, shall be paid per diem in accord with the Pilot Employment Policy. A pilot will be placed on the payroll after five (5) days in training whether or not s/he has completed training; the pay status will be that of the position the pilot is expected to occupy on his first day of active service as a line pilot.

8. *(a)* Training will be accomplished in accordance with the Company's FAA Approved Flight Crew Training Manual. In addition to the syllabus of training outlined in the manual, up to two additional simulator periods will be scheduled if necessary to satisfactorily complete the required training periods. Scheduling of training will normally insure changes of instructor. If a pilot fails to qualify, he/she will repeat the syllabus including the two extra simulator periods if required after a maximum fourteen (14) day period free of all

duty. The syllabus may be reduced during the second training cycle by the pilot if desired, i.e., ground school, CPTs, etc.

(b) The disposition of a pilot who fails to qualify after the second training cycle will be determined by the Vice President–Flight Operations, subject to the pilot's right to pursue the dispute resolution procedure in Section V below. Nothing herein shall constitute a requirement that the Company maintain a permanent First or Second Officer position for a pilot who has failed to qualify for a promotion to Captain.

9. Striking pilots who elect recall will accrue seniority for all purposes during period of strike and while awaiting recall; such pilots will not accrue longevity credit for active service for purposes of pay and vacations for such periods. Pilots who were not in continuous active service from October 31, 1983 through December 31, 1983 shall not receive any stock or other rights under the Stock Bonus Plan.

II. ***Severance Option And Claims Waiver***

A. *Severance Pay and Claims Waiver*

1. Each active pilot on the CAL/TXI integrated seniority list as of September 24, 1983, as revised by Paragraph I.B.3., including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) who (a) has not died, resigned, retired, or become permanently disabled, and (b) who is currently on strike and (c) who is not employed (on the active payroll) as a pilot by an F.A.R. Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay, in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in paragraph II.C. below. A pilot electing this Severance Pay Option shall notify the Company of his election within twenty–one (21) days following his receipt of the Notice provided pursuant to Section I.B.5; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Severance Pay Option shall be deemed waived and unavailable to any pilot who does not notify the

Company in writing of his election of the Severance Option within twenty–one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5, supra. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

2. The amount of Severance Pay for each pilot eligible to elect this option pursuant to paragraph 1 will be calculated by multiplying $4,000 times the number of years of active service with the Company as of September 24, 1983; provided however, the total dollar amount of severance pay for those pilots electing severance who were not drawing ALPA strike benefits as of September 15, 1985 and were not on furlough status as of September 24, 1983 shall not exceed $2.6 million. In the event a sufficient number of pilots in this category elect severance pay which causes the dollar amount to exceed $2.6 million, the $4,000 multiplier shall be reduced sufficiently so that pilots in this category do not receive a total aggregate severance pay distribution exceeding $2.6 million. Years of service will be calculated by crediting the pilot with one (1) year of active service for each calendar year of active service as a pilot, with partial years to be pro–rated, during the period beginning with the pilot's date of hire shown on the CAL/TXI integrated seniority list and ending on September 24, 1983.

3. A pilot on furlough status as of September 24, 1983 who is not currently active (including those pilots who have been terminated (subject to reinstatement by arbitration pursuant to Section I.A.3.) and who has not died, resigned, retired, or become permanently disabled and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award will be given the option of electing Severance Pay subject to the same waivers and procedures set forth in paragraphs II.A.1–2., supra, provided that the severance rate will be $2,000 per year of active service as of September 24, 1983. The parties shall cooperate in identifying those pilots employed at Part 121 air carriers.

4. The schedule for payment to those electing this Severance Pay Option will be as follows:

10% – on or before December 15, 1985

15% – upon confirmation of a reorganization plan, but in no event later than June 30, 1986.

Balance – quarterly payments in accordance with the following schedule commencing September 30, 1986.

(a) 1 year – 5 years active service – 4 quarterly payments

(b) 6 years – 10 years active service – 8 quarterly payments

(c) 11 years – 15 years active service – 12 quarterly payments

(d) 16 years – 20 years active service –16 quarterly payments

(e) 20 years + active service – 20 quarterly payments

The Company may accelerate the timing and/or increase the amount of such payments.

Interest at a rate of 10% shall accrue on amounts which remain due after eight quarters from September 30, 1986. The Company shall not be responsible for withholding FICA or FIT from these payments but will supply each payee with an annual Form 1099 showing the amount paid in each taxable year.

B. *Early Out Pass Privileges and Claims Waiver*

1. Each pilot on the CAL/TXI integrated seniority list who was in furlough status as of September 24, 1983, and who is not currently active and who has not resigned, retired, or been terminated for cause (subject to reinstatement by arbitration pursuant to paragraph I.A.3.) and who is not employed (on the active payroll) as a pilot by a Part 121 air carrier as of the date of this Order and Award, shall be eligible (in addition to severance pay pursuant to Section I.A.3.) to elect Early Out Pass Privileges as set forth in subparagraph B.2. infra in exchange for (1) waiver of his/her right to recall and (2) waiver of all claims against the Company, its employees and affiliates, as set forth in subparagraph II.C. below. A pilot electing this Early Out option shall notify the Company of his election within twenty–one (21) days following his receipt of the Notice provided pursuant to Section I.B.5.; such election shall be irrevocable and shall constitute resignation of his/her seniority number and a waiver of all further rights to recall or reinstatement. The Early Out Option shall be deemed waived and unavailable to any pilot who does not notify the Company in writing of his election of the Early Out Option within twenty–one (21) days of his receipt of the Notice of Options provided pursuant to Section I.B.5., supra.

2. Pilots electing this Early Out option shall receive pass privileges commencing January 1, 1986, as follows:

Pass Privileges (on–line only)

Hire Date	Annual On–Line Round–Trips	Service Charge
August 1, 1965 or before	20	(Same
August 2, 1965 through August 1, 1975	8	(As For (Active (Employees
August 2, 1975 through August 1, 1980	6	(Employees (
August 2, 1980 through August 1, 1982	4**	(

The number of passes per year is an equal number for the employee and the same number of additional passes for each eligible immediate family member. All pass privileges are subject to Company rules concerning pass privileges; violation of those rules may result in suspension or termination of pass privileges. Any personal income tax consequences arising from use of passes will be the responsibility of the employee. While there are currently no taxes applicable, we cannot predict what the IRS requirements may be in the future. Service charges apply.

**The pass benefit in this category (3 to 5 years of seniority) *expires* five years from the date of resignation or upon the death of the employee. The benefit for the other categories is for the lifetime of the employee.

C. *Waiver of Claims.*

As a condition to election of the Severance Pay Option or the Early Out Option, each pilot who desires to pursue either Option shall be required to (a) execute a waiver and release of any and all legal claims of any nature against Continental Airlines, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors), except bankruptcy claims for 1) unpaid pre–petition wages (including bank time and earned per diem) 2) unpaid pre–petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre–petition expenses (including moving expenses) (the "surviving bankruptcy claims"), (b) to commit these surviving bankruptcy claims to a trustee to be named by the Company for voting purposes only, with instructions to vote the claims in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all the actual final amount due for the surviving bankruptcy claims shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The final amount due will be paid in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

III. *Other Claims and Litigation*

A. *ALPA Bankruptcy Claims*

All bankruptcy claims filed by ALPA, and all motions and appeals relating thereto, shall be withdrawn and treated as settled and dismissed with prejudice; this provision shall not apply to (1) issues relating to unpaid pre–petition contributions owed by Continental to the Pilot Pension "B" Plan, which issues shall be subject to resolution outside the scope of this Order and Award; (2) the ALPA claim for prospective medical insurance costs for pilots who were in retired status as of September 24, 1983, which shall be subject to resolution as a Bankruptcy Claim but subject to a maximum cap on total liability of $500,000.

B. *Individual Claims*

1. ***Undisputed Items to Be Paid.*** Continental will pay 100% of the bankruptcy claims of all pilots, for 1) unpaid pre–petition wages, (including bank time and earned per diem), 2) unpaid pre–petition medical and dental expense claims, 3) accrued but unused vacation and 4) reimbursable pre–petition expenses (including moving expenses), subject only to final determination of the amount due. The actual amount due for such items shall be determined by informal conference between the Company and the employee; in the event of continued disagreement, the final amount due will be determined pursuant to procedures approved by the Bankruptcy Court. The Company will also pay amounts due pursuant to the resolution of ALPA Grievance 12–83 and any other unpaid Grievance Arbitration Awards for monetary relief entered prior to September 24, 1983. In any event, payment for such claims will be in accord with the terms of the final Reorganization Plan to be approved by the Bankruptcy Court.

2. ***Waiver of Disputed Items and Release of All Other Legal Claims.*** Continental has disputed liability for all other items asserted as Bankruptcy Claims by individual employees and for all other legal claims threatened or asserted by individual employees. As a condition to participation in the recall by seniority order pursuant to Section I.B., individual striking pilots will be required (a) to waive and release all such disputed bankruptcy claims and all other legal claims of any nature against Continental, its employees (including officers and directors) and affiliates (including Texas Air Corporation) and their employees (including officers and directors); (b) to commit their remaining undisputed bankruptcy claims to a trustee to be named by the Company for voting purposes only with instructions to vote the claim in support of Continental's proposed Reorganization Plan; and (c) to agree to be subject to all terms and provisions of this Order and Award.

3. ***Treatment of Pilots Who Decline Waiver.***
A striking pilot who declines to execute the waiver described in paragraph III. B. 2, supra, will retain his right to recall but will be recalled subsequent to the recall of waiving pilots and in the chronological order in which each such non–waiving pilot contact(ed) Continental to tender an unconditional offer to return to work. ALPA shall provide no support or assistance, direct or indirect, to any such non–waiving pilot in further pursuit of his bankruptcy claims, or any other claims against Continental, its employees (including officers and directors) or its affiliates and their employees (including officers and directors).

4. ***Minimum Level of Participation.***
Continental shall have the right to abrogate this Order and Award in the event that less than 80% of the striking pilots eligible to elect options pursuant to this Order and Award fail to elect either (a) Recall with waiver of disputed claims, or (b) The Severance Pay Option and Claims Waiver, or (c) The Early Out Pass Privileges and Claims Waiver.

5. ***Remedies in Event of Future Job Actions.***
In the event of any job action, slowdown, sick–out, withdrawal of enthusiasm, inordinate fuel burn, inordinate mechanical write–ups or any other improper concerted action by striking pilots who have returned to work, Continental shall have the right to seek an immediate hearing upon 24–hour notice (or such different notice as the Court may set) before Bankruptcy Court Judge Glover T. Roberts (or, if he is unavailable, before the Bankruptcy Court). The Court shall have jurisdiction to issue immediate injunctive relief and such other forms of relief, including damages, as the Court deems appropriate in the circumstances.

C. *Other Bankruptcy Proceedings.*

Except as otherwise provided herein, ALPA will not further participate in Bankruptcy Court proceedings relating to Continental or its affiliates; provided, however, that ALPA may be selected by an affected pilot to appear as his personal representative where a personal representative is permitted to participate in proceedings pursuant to this Order and Award.

ALPA will withdraw from further participation in the activities of the Official Union Labor and Pension Creditors Committee.

D. *Pension Issues.*

All pension issues are to be resolved as provided in Attachment C. All claims arising from the freezing, rejection, or termination of any pilot pension plan shall be treated as settled and dismissed with prejudice.

E. *Other Claims and Litigation.*

All pending litigation cases between ALPA, Continental (and its affiliates and their employees, officers and directors) (the "parties") will be treated as settled and dismissed with prejudice and all claims against such parties shall be waived with respect to the subject matter of the pending litigation being dismissed. Continental will also dismiss its claims against each individual pilot defendant in such litigation who elects an option under this Order and Award which includes resolution of all of his claims against Continental, its employees and affiliates in accord with Section II.C. or Section II.B.2. Continental shall provide no support or assistance, direct or indirect, to any individuals in further pursuit of the lawsuit entitled *Moore et. al v. ALPA*, Civil Action No. H–85–3608 (S.D. Tex.) (fines). other than payment of attorney fees and costs accrued for work performed to the date of this Order and Award which are approved by the Bankruptcy Court. ALPA will withdraw any and all claims and charges it has filed against Continental, its employees or affiliates with any Federal, State or Local government agency. (See Litigation Attachment #B.)

IV. ***Non–Recognition***

This Order and Award shall not constitute express or implied recognition of ALPA by Continental as the prospective collective bargaining representative of Continental pilots, and shall not affect the right of any party to recourse before the National Mediation Board for such action as may be appropriate.

V. ***Dispute Resolution Procedure***

Any disputes which may arise concerning the interpretation, or application of the terms of this Order and Award, other than cases which may arise pursuant to paragraph I.A.3. or I.B.8(b) of this Order and Award, may be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to the Bankruptcy Court as an adversary proceeding.

Disputes which arise pursuant to Paragraphs I.A.3. or I.B.8.(b) of this Order and Award may likewise be submitted by the affected pilot in writing to the Company. If the dispute is not satisfactorily resolved within five (5) days, the affected pilot may submit the dispute forthwith to arbitration for final and binding decision. The case shall be heard and decided by one arbitrator to be selected by the alternate striking method from a panel of five (5) names (each of whom shall be a member of the National Academy of Arbitrators) to be provided by the American Arbitration Association upon request of the affected pilot. A coin toss shall be used to determine which party strikes first. The parties expressly agree to select the arbitrator within three (3) days of receipt of the panel provided by the American Arbitration Association. Said arbitration shall commence within forty–five (45) days of the selection of the arbitrator. Any resulting arbitration award shall be subject to enforcement or review in the Bankruptcy Court.

The affected pilot(s) may appear or participate in the dispute resolution process in the Bankruptcy Court or in arbitration by any personal representative of his choice.

The provisions of this Section do not apply to the interpretation or application of the Pilot Employment Policy, the Pilot Scheduling Manual or Company Policy, all of which remain beyond the jurisdiction of this procedure.

VI. ***Continuing Jurisdiction and Expiration Date.***

The Bankruptcy Court shall retain jurisdiction, both pending plan confirmation, and post–confirmation, to enforce the terms of this Order and Award. The provisions of

this Order and Award shall expire no later than the date on which the last returning striker assumes a Captain position at Continental Airlines. Entered this 31st day of October, 1985, at Houston, Texas, pursuant to the procedural agreement of the parties on the record.

/s/
T. Glover Roberts
United States Bankruptcy Judge

Attachment B
October 31, 1985

LITIGATION ATTACHMENT

All pending Litigation to be dismissed with prejudice, including, but not limited to:

1. *Continental Airlines Corp., et al v. Air Line Pilots Association, et al.*, Br. Consolidated Case No. 83–04019–H2–5, Adversary Proceeding No. 83–2386–H3 (Bank. S.D. Tex.).

2. *Air Line Pilots Association v. Continental Air Lines, Inc.*, Civil Action No. H–83–6196 (S.D. Tex.); Adversary Proceeding No. 83–2455–H1.

3. *Continental Airlines Corp., et al v. Air Line Pilots Association, et al.*, Br. Consolidated Case 83–04019–H2–5, (Bankr. S.D. Tex.). ALPA to withdraw any and all motions and appeals, including:

1. Motion to dismiss
2. Motion to reject contract
3. CAL motion to pay pre–petition wages to non–returnees
4. CAL motion to terminate insurance benefits
5. CAL motion to implement stock ownership program
6. CAL motion to pay law firms representing disciplined employees

4. *Air Line Pilots Association v. Texas International Airlines, Inc.*, Civil Action No. H–81–2200 (S.D. Tex.); No. 83–2272 (5th Cir.). Vacate the District Court's judgment. ALPA to withdraw its grievance in the underlying controversy.

5. *Texas Air Corp. v. Air Line Pilots Association*, Civil Action No. H–84–530 (S.D. Tex), Adversary Proceeding No. 84–0228H1. ALPA to withdraw with prejudice its request for arbitration and waive all claims arising under the TAC–ALPA Side Letter.

6. *Continental Air Lines Corp., v. Air Line Pilots Association*, Adversary Proceeding No. 84–0617–H3, Bankr. S.D. Texas. (suit to enjoin TAC arbitration)

7. *Continental Airlines, Inc., v. Air Line Pilots Association, International*, California Superior Court, Los Angeles County No. C–470501.

8. In re New York Air, National Mediation Board File No. CR–5177.

9. *Air Line Pilots Association, International v. Continental Airlines, et. al.* Case No. 85–5203 (S.D. Tex.) All claims and counterclaims dismissed.

10. In re Air Line Pilots Association, No. 85–2650 (5th Cir.) (ALPA petition for mandamus).

11. *Air Line Pilots Association, International v. Continental Airlines Corporation et al.*, U.S.D.C. (S.D. Tex.) Civil Action H–85–5675.

12. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H–84–3069 (S.D. Tex.) (ALPA appeal from Order re mass disciplinary hearings).

13. *Continental Air Lines, Inc. v. ALPA*, Civil Action No. H–83–5979 (S.D. Tex) (TRO and attorneys fees).

14. *Air Line Pilots Association v. Continental Air Lines, Inc., et al.*, Civil Action No. H–84–1555 (S.D. Tex.) (pension plans).

15. *In re Continental Airlines Corp., et al.*, MBH No. 85–360 (S.D. Tex) (Motion for Stay).

16. Grievances. All pending grievances and/or arbitrations shall be treated as settled and dismissed with prejudice except for those grievances relating to terminations for cause which are subject to arbitration pursuant to Section I.A.3.

17. Pending litigation between ALPA and Continental in Great Britain shall be treated as settled and dismissed with prejudice provided that a mechanism for the enforceability of this Order is available.

18. Pending litigation in Australia shall be treated as settled and dismissed with prejudice provided adequate retractions are provided.

Terms For An Order On
Consent With Respect To
The Pilots' Pension Plans

A Plan

1. The Continental Air Lines, Inc. ("CAL") Fixed Pension Plan For Pilots (the "A Plan") be, and it hereby is, rejected and terminated effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, in accordance with the amendment to the CAL Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. ***Open Issue*** In order to effectuate the orderly winding up of the A Plan including an orderly distribution of the A Plan's assets as soon as possible, CAL shall continue to administer the A Plan and its assets for the purposes thereinafter set forth and shall take the actions hereinafter provided to be taken, provided that CAL shall notice pilot participants and involve the Benefits Board in making decisions relating to the Plan.

3. CAL shall take all steps necessary to obtain from the the Internal Revenue Service ("IRS") a determination that the termination of the A Plan does not adversely affect the qualification of the Plan, the application for which has been submitted to the IRS by CAL.

4. The A Plan shall be deemed technically amended in a manner satisfactory to CAL and ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting for each participant who did not have a severance of employment prior to September 24, 1983.

(b) In the event of the death of a participant prior to March 9, 1984, payment of the same death benefit as would have been payable under the A Plan prior to its amendment on March 9, 1984.

(c) Continuation of the A Plan's provisions concerning distributions on termination of employment, so that any participant who terminates before the date an annuity is purchased pursuant to paragraph "6" of this Order will receive his distribution (as vested under this Order) under such provisions, subject to any elections he may make pursuant to clause (d), below.

(d) An option for participants who have terminated employment to defer receipt of the distribution of the certificates under the annuity contract to be purchased pursuant to paragraph 6 and of benefits payable under the A Plan until the distribution of benefits under the Continental Air Lines, Inc. Variable Pension Plan for Pilots (the "B Plan").

(e) Automatic consent of CAL to early retirement for all participants upon reaching age 45, provided they have terminated employment.

(f) Technical compliance with the provisions for qualified plans under Section 401 of the Internal Revenue Code.

5. CAL shall provide the proper option forms to the Plan participants within 30 days of the date of the entry of this Order.

6. ***Open Issue*** Full distribution to Plan participants as a result of the termination of the A Plan shall be made by the purchase of an annuity contract, and distribution of individual certificates under the contract, pursuant to the September 11, 1985 proposal from Prudential Insurance Company of America or any similar proposal by an insurance company acceptable to CAL and the Benefits Board except that lump sum payments will be made for benefits with a present value of less than $3,500 based on the 1984 Unisex Pension mortality table and PBGC interest rates used for valuing annuities under terminating plans as of the first day of the

calendar quarter preceding the date of distribution of the lump sums, except as otherwise may be required by the PBGC. The benefit payment options under the A Plan will be preserved under current terms and will be calculated using an 8% interest rate and the 1984 Unisex Pension mortality table. In addition, in the event of the death of a participant prior to the commencement of the payment of a retirement benefit under the annuity, the only death benefit payable (which shall be payable at no cost to the participant) shall be 50% survivor benefit payable (to the participant's spouse, if married, or beneficiary if not married or if the spouse waives the death benefit) on or after the date the participant would have attained age 45.

(i) if a participant is married assuming the participant retired on the day before his death and elected a joint and 50% survivor benefit, and

(ii) if a participant is not married, assuming the participant was married with a spouse two years younger than the participant, the participant retired on the day before his death and elected a joint and 50% survivor benefit.

7. ***Open Issue*** The Benefits Board will remain intact with pilot representation and the pilot members will have joint signatory authority with CAL over release of benefit payment statements until annuities are purchased and in effect.

8. Any reversion (excess assets after purchase of the aforementioned annuity contract) upon termination of the A Plan will be paid to CAL.

9. Additional amounts shall be distributed from the A Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of this Order.

10. Upon entry of this Order, ALPA shall take such action as is appropriate to request a stay of that portion of *Air Line Pilots Association, International v. Continental Air Lines, Inc.*, Civ. Action No. H–84–1555, pending in the United States District Court for the Southern District of Texas, that relates to the A Plan, and upon the purchase of the annuity contract provided in paragraph "6" of this Order, ALPA shall take the appropriate steps to obtain the dismissal of such action that relates to the A Plan (with respect to all defendants in such action), all such action to be subject to the approval and direction of the United States District Court for the Southern District of Texas.

11. CAL shall be, and it hereby is, authorized and empowered to execute and deliver any documents, including, without limitation, the execution and delivery of documents memorializing and effectuating the provisions of paragraph "4" of this Order to the extent such provisions have not previously been made part of the A Plan and to take any further actions as may be necessary to effectuate the rejection and termination of the A Plan and the provisions of the Order as hereinabove provided.

12. In the event that distributions already made to participants who have terminated employment since the date of the Chapter 11 petition were calculated erroneously, giving such participants more than their proper share of the existing Plan funds, CAL or the Benefits Board shall have the right to seek further relief to insure equitable treatment of all Plan participants.

13. In the event a participant in the A Plan dies between March 9, 1984 and the first date benefits are paid out to any participant under the annuity contract referred to in paragraph 6 above, CAL shall pay to the participant's beneficiary an amount equal to the difference between the death benefit payable under the A Plan prior to amendment on March 9, 1984 and the death benefit payable under the Plan as so amended.

14. The terms of the Plan shall not be further amended without the consent of ALPA, except as provided by this Order or as is necessary to retain its qualified status.

TXI Plan

1. The Texas International Airlines, Inc. Fixed Pension Plan for Pilots ("TXI Plan") be and it is rejected effective immediately prior to the commencement of the Chapter 11 case on September 24, 1983, provided that the TXI Plan shall not be terminated but shall be considered frozen effective as of September 24, 1983, as provided in an amendment of the TXI Plan dated March 9, 1984, to the extent not inconsistent with this Order.

2. CAL shall continue to administer the TXI Plan and its assets for the purposes hereafter set forth and shall take the actions hereafter provided to be taken, provided that CAL shall continue to comply with the terms of the Plan providing for notice to ALPA and the involvement of ALPA in making decisions relating to the Plan.

3. The TXI Plan shall be deemed technically amended in a manner satisfactory to CAL and to ALPA, to the extent not previously amended, providing for, among other things:

(a) Full vesting, for all participants who did not have a severance of employment prior to September 24, 1983, of all benefits accrued as of that date.

(b) Participants who were 40 years of age or older on September 24, 1983 will be eligible for subsidized early retirement benefits (using a 3% reduction in benefits for each year of benefit payments prior to age 60) upon termination of employment. Participants under 40 years of age on September 24, 1983 will be eligible for early retirement benefits upon termination of employment at age 42 (using a reduction in benefits for each year of benefits prior to age 60, based on an 8.5% per annum interest rate and the 1985 Group Annuity table). No benefit shall commence prior to the first day of the second month following the entry of the Order.

(c) Upon the death of any participant prior to March 9, 1984, the same death benefit shall be paid as would have been payable under the TXI Plan prior to its amendment on March 9, 1984.

4. The Plan shall not be amended, except as provided by this Order or as is necessary to retain its qualified status, without the consent of ALPA.

5. CAL may, at its option, provide for any benefits due under this Order, with regard to the participants in the TXI Plan, through a separate tax qualified plan which would be subject to the approval of ALPA.

6. Additional amounts shall be distributed from the Plan to any participant or beneficiary to whom a distribution has been made since September 24, 1983 on a less than fully vested basis, within 30 days after the date of entry of this Order in an amount equal to the difference between the distribution previously received and that which would have been received based upon the vesting provisions of the Order.

7. ***Open Issue.*** The Pension Committee will remain intact with pilot representation, and the Pension Committee will have joint signatory authority with Continental over release of benefit payment statements.

8. CAL shall fund the TXI Plan, and any alternate plan established pursuant to paragraph 6 of this Order, at a level not less than level annual payments that will fully amortize the cost of all benefits no later than December 31, 1995, using an assumed 11% interest rate and the 1985 Group Annuity table.